FEDERAL TRADE COMMISSION USED CAR RULE

HEARING

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. Con. Res. 33

DISAPPROVING THE FEDERAL TRADE COMMISSION TRADE REGULATION RULE RELATING TO THE SALE OF USED MOTOR VEHICLES

OCTOBER 30, 1981

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FEDERAL TRADE COMMISSION USED CAR RULE

FRIDAY, OCTOBER 31, 1981

U.S. SENATE,
SCIENCE, AND TRANSPORTATION, COMMITTEE ON COMMERCE,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 10:04 a.m. in room 235 of the Russell Senate Office Building, Hon. Bob Kasten (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR KASTEN

SenatorKASTEN. The committee will come to order.

I would first like to apologize to those of you who may have come earlier to attend the hearing on the nomination of Keith Adkinson for Commissioner of the Federal Trade Commission. I am sorry that we've had to postpone that. I am sure the committee will reschedule that hearing in the very near future, possibly next week.

Today the Consumer Subcommittee will hear testimony on Senate Concurrent Resolution 33, a resolution introduced by Senator Pressler on September 15 to disapprove the Federal Trade Commission's trade regulation rule relating to the sale of used motor vehicles.

We are making history here today. This is the first test of the congressional veto over a major rule promulgated by the Federal Trade Commission. Under the FTC Improvements Act of 1980, the FTC must submit newly issued rules to Congress for review, and a rule will not take effect if both Houses disapprove the rule by concurrent resolution within 90 days. This hearing is an especially significant one for our subcommittee, for it represents an important step in the process of implementing this recently enacted legislative veto provision.

It is my belief that the legislative veto is a necessary and essential tool through which Congress can insure that an agency's exercise of its delegated legislative power is consistent with congressional intent. The veto will allow elected officials to take a look at the impact of specific rules and regulations. Most importantly, the congressional veto means that elected officials, not appointed bureaucrats—elected officials who face the voters every 2 years or every 6 years—will be in control of the delegated legislative authority of this Congress.

We began with three branches of Government: the executive, legislative, and judicial branches. All of a sudden we had a fourth branch, the bureaucracy. Many people in this last election felt that

it was important right now, as we see the tremendous growth of the Federal Government and the power of the regulatory agencies, to establish a legislative veto. I recently supported the creation of a legislative veto over rules promulgated by the Consumer Product Safety Commission. I will continue to support efforts undertaken by Senator Schmitt and others to extend the legislative veto to other agencies.

The importance of the legislative veto makes it especially important that FTC rules submitted to the Senate are considered smoothly and efficiently from a procedural point of view. Review of the FTC rules will provide an important illustration of how the veto can work in the context of major regulatory agencies. It is for this reason, and because as chairman of the Consumer Subcommittee I have an institutional responsibility to see that the review proceeds smoothly, I have prepared a general policy statement summarizing the procedures for Senate consideration of FTC rules, based on the Improvements Act and the Senate and Commerce Committee rules. This statement has been circulated to other Senate Commerce Committee members, and yesterday it was printed in the Congressional Record.

We are pleased to have Senator Pressler with us here today, and witnesses representing the Federal Trade Commission, the Center for Auto Safety, the Attorney General's Office of the State of Masschusetts, and two national auto dealer associations. I would like at this point, before Senator Pressler begins, to ask Senator Cannon, Senator Long, and Senator Gorton if they have any opening statements, and at that point we will proceed to Senator Pressler.

[The resolution follows:]

[S. Con. Res. 33, 97th Congress, 1st session]

Concurrent resolution disapproving the Federal Trade Commission trade regulation rule relating to the sale of used motor vehicles

Resolved by the Senate (the House of Representatives concurring), That the Congress disapproves the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which final rule was submitted to the Congress on September 10, 1981.

Senator KASTEN. Senator Howard Cannon?

OPENING STATEMENT BY SENATOR CANNON

Senator CANNON. Thank you, Mr. Chairman.

Since the passage of the Magnuson-Moss Act in 1974, I have closely observed the Federal Trade Commission activities with respect to the issue before us today, the trade regulation rule on used motor vehicles. Having voted for passage of this warranty legislation in 1974, I am pleased that the FTC has followed clear congressional intent in drafting part of the rule, a warranty disclosure provision, by providing for disclosure of information concerning the extent of warranty coverage at the point of sale. Consumers will be able to make informed purchasing decisions based on accurate and complete information about warranty protection offered by the dealer.

However, a provision of the rule requiring dealers to disclose known defective components indirectly requires an inspection by the dealer. I oppose this provision as contrary to the congressional intent. In 1975 the FTC responded to the Magnuson-Moss Act by issuing a rule requiring a mandatory inspection of the vehicle. Both the House and Senate Commerce Committees responded to this proposal with criticism. Following hearings on the FTC's proposal, the Senate Commerce Committee in its Federal Trade Commission Act of 1979, S. 1991, adopted a provision which I strongly supported, expressly prohibiting the mandating of inspections and/or warranties. The Commission then altered its rule to adopt what was termed an optional inspection rule. Fifty of my Senate colleagues joined me in signing a letter to Chairman Pertschuk in September of 1980, expressing concern over the substance and burdensome nature of this rule. I personally felt that the so-called optional inspection was not a true option, but would force dealers to inspect and warrant their vehicles.

In August of 1981 the Commission issued the rule before us today. Once again, the FTC decided to issue a rule which failed to comply with congressional intent. Legislative history does not authorize the FTC to promulgate a known defect disclosure rule. In fact, as I have noted, legislative history indicates that Congress did not intend a rule which goes beyond warranty disclosure to directly or indirectly require an inspection.

I am particularly concerned about the impact of the proposed rule in light of the present economic situation. I have been told that the rule will result in increased costs to dealers that will be passed on to the consumers. I am also concerned that the rule is so unclear that the dealer will not know whether he has complied. Perhaps some of the ambiguities in the present language of the rule can be clarified today. I will certainly listen with interest to witnesses who favor and oppose this rule as the hearings develop.

Thank you, Mr. Chairman.

Senator KASTEN. I want to thank the Senator from Nevada.

Senator Gorton?

Senator GORTON. I think Senator Long preceded me.

Senator KASTEN. Senator Long?

Senator LONG. I have no comments.

OPENING STATEMENT BY SENATOR GORTON

Senator GORTON. Thank you, Mr. Chairman.

Reading the Federal Register in relation to this Federal Trade Commission regulation recalled to my mind the 12 years of my service as attorney general of the State of Washington. My responsibilities included enforcement of the State's consumer protection laws. Consistently, one of the leading categories of consumer complaints to my office involved allegations of unfair and deceptive practices in the sale of used cars.

Since the FTC's used car rulemaking proceeding grew out of an investigation begun by the Commission's Seattle regional office in 1973, I suppose that it is not surprising that I have discovered that the findings of the Commission, which form the basis for this rule, closely parallel my own impressions from my experience in this field. The principal abuses in the used car industry involve oral

misrepresentations and deceptive omissions of material facts by dealers concerning the mechanical condition of the car and the dealer's after-sale repair responsibility.

More specifically, consumers frequently complain of misrepresentations concerning the limited extent of the dealer's liability under an express warranty, oral promises which conflict with the standard-form contract disclaimer of any express or implied warranties in as-is sales and which prove to be totally unenforceable, and misrepresentations about the mechanical condition of the car, including the failure to disclose material defects which were likely to be known by the dealer.

In buying a used car, many consumers are making one of the larger individual investments of their lives. In most cases, they necessarily depend upon the seller's expertise and good faith concerning [illegible] the mechanical condition of the car and explanations of the legal technicalities of warranty protection. Obviously, these are among the most material factors which should carefully be weighed in making the purchase decision. Yet, with alarming frequency, relevant disclosures of this kind are not made at all, or are only made after the consumer's decision has essentially been completed.

I have said that in my experience, this is among the most troublesome areas of consumer affairs. We are not speaking here only of consumer protection, but also of protection for the honest, scrupulous businessman. One of the first major lawsuits to enforce consumer protection laws which I prosecuted as State attorney general was one against an automobile dealer which involved precisely the type of conduct we are discussing today. Although there were numerous consumer complaints, it was a group of competing automobile dealers that was loudest in the demands for action in this case and that supplied the most devastating testimony for the State. Unfair and deceptive practices against consumers clearly constituted, at the same time, unfair competition against businesses which did not engage in such conduct.

This point was made eloquently in the FTC record by Stanley Hoyninski, a spokesman for the Pennsylvania Automobile Dealers Association, when he said:

> The used car business is a natural business for some unscrupulous businessmen. The nature of the motor vehicle, with its many thousands of internal parts, makes it highly susceptible to hidden defects, known or unknown to the seller. There is need to protect the consumer from these unscrupulous dealers who, I acknowledge, have crept into the used car business.

My own experience reinforces the findings that a serious problem exists in the used car industry and that there is need for some form of remedy. The question remains whether the rule before us today is an appropriate response—whether this rule is reasonably adopted to remedying the specific record abuses.

What does the rule require? I am certain this will be fully debated in the course of this hearing.

It appears to me that it simply requires three types of disclosures by the dealer. First, it mandates warranty disclosures. The rule requires that dealers indicate whether a warranty is offered or whether the car is sold "as is." If the warranty is offered, the dealer must disclose the mechanical systems which are covered, the

percentage of repair costs paid for by the dealer, and the duration of the warranty.

Next, the rule requires a limited disclosure of known defects. The dealer must disclose the existence of certain major mechanical defects in the cars they offer for sale, if they are known to the dealer. The rule explicitly provides that dealers are not required to inspect or discover defects.

Finally, the rule provides for some standard form disclosures. A series of general information statements are to be made. These amount to simple warnings to consumers about the unenforceability of oral promises and advice concerning possible helpful questions to ask dealers.

All of these disclosures are to be made by using a window sticker, which seems to be very creatively designed, and which absolutely minimizes costs and paperwork for the dealers. Not only does this rule seemed custom-made to remedy the specific abuses of this industry, which the extensive Commission record documents, but I cannot imagine a less burdensome regulatory scheme to accomplish this end.

If anything, the rule is subject to potential criticism that it may be too weak. In fact, the Commission ultimately rejected two previous proposals recommended by its staff which would have involved mandatory and optional inspection requirements which were obviously far stricter approaches. It appears to me that we have before us a rule which merely provides that consumers will be given, in a timely fashion, the material information essential to making a reasoned decision in the case of a major purchase. In the free enterprise system, I cannot imagine a more basic standard of fair dealing.

I am amazed about all of the controversy which this has engendered. As the chairman of this subcommittee has wisely called to our attention, this is the first important test of the legislative veto in the context of FTC rules. I am inclined to think, at this stage in our deliberations, that this is not the type of regulation which we should seriously consider overturning if the legislative veto process is to work successfully and have credibility in the eyes of the public.

Thank you, Mr. Chairman.

Senator KASTEN. For the benefit of all of the witnesses here today, I would like to review quickly the hearing procedures that will be in effect. Each witness today will have the opportunity to make a 10-minute oral presentation. The hearing clerk will indicate when the time is expired. Following the presentations, we will begin rounds of questions from members of the subcommittee.

Senator Larry Pressler, we are looking forward to hearing your presentation.

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM SOUTH DAKOTA

Senator PRESSLER. Thank you, Mr. Chairman and members of the committee. I would like to express my sincere appreciation to the subcommittee for holding hearings so promptly on Senate Concurrent Resolution 33, which I introduced in the Senate on September 15, and which now has been cosponsored by at least 35 of our

colleagues. Perhaps by the end of this week we will have that number up to 40. I ask that a list of the present cosponsors, which I have brought with me, be placed in the hearing record.

Senator KASTEN. Without objection, so ordered.

[The list follows:]

COSPONSORS OF SENATE CONCURRENT RESOLUTION 33

Senator Abdnor, Senator Symms, Senator Zorinsky, Senator Exon, Senator Laxalt, Senator Eagleton, Senator Boren, Senator Andrews, Senator Jepsen, Senator Helms, Senator McClure, Senator DeConcini, Senator Melcher, Senator Huddleston, Senator East, Senator Nickles, Senator Hatch, Senator Inouye, Senator Domenici, Senator Humphrey, Senator Burdick, Senator Wallop, Senator Harry F. Byrd, Jr., Senator Goldwater, Senator Cochran, Senator Simpson, Senator Bumpers, Senator Tower, Senator Cannon, Senator Sasser, Senator Heflin, Senator Mastsunaga, Senator Grassley, Senator Boschwitz, Senator Hollings.

Senator PRESSLER. As I know you are aware, this resolution disapproves a recently promulgated rule by the Federal Trade Commission which could have a severe effect on small businessmen around the country. I might say that I have a prepared statement, but I shall ad lib a bit and summarize.

It is perhaps, as you said, historically significant, because it is the first attempt to use the two-house veto on the FTC rules which we passed just a short time ago. I would like this to be viewed as a much broader thing than a used car resolution. I know it has been labeled that way. My staff humorously said this morning, that I was going to defend the used car dealers, and a politician shouldn't do that. The point is, most used car dealers are very honest and work very hard and want to comply with ethics and do comply with ethics.

This is really a question of Federal regulation, and both the Democratic and the Republican party platforms have talked about lessening Federal regulation. If such a thing as this is done, it could be done at the State level or it could be done by Congress, if indeed we are going to engage in this type of major Federal regulation. It is so important that it should be done by Congress, rather than an agency.

Now, the favorite thing of a Member of Congress has always been to blame the agencies when we are out campaigning. If there is something wrong, we say that is a Department of Agriculture regulation or an FTC regulation. It is hard for citizens to pin their Member of Congress down. And here there is a major Federal regulation being issued out of Washington, D.C., and not a single Member of Congress would be responsible. They would be able to say, "The FTC did that; isn't that awful." But here we are forcing a roll call vote on whether or not we are going to extend Federal regulation from Washington, in an atmosphere across our country where people say that they want to lessen Federal regulation.

I think that is the real issue before us. I think it is more important than getting off into the specific merits or demerits of this. The key question that this committee faces and that Congress faces is do we want to extend Federal regulation in this current atmosphere?

We have seen increasing regulation of our life. Small business and big business have felt the impact. Much of the regulation has not come directly from Congress, but rather from independent

regulatory agencies operating frequently under vague guidelines or authority delegated by Congress. Because of the increasing frustration of Americans with burdensome regulations, Congress has begun to reexamine and reduce the authority it delegates to agencies. One of the results was the Federal Trade Commission Act of 1980, which contained a two-house veto provision for rules issued by that agency.

The resolution which we are considering today is based upon this legislation. I believe the principle behind this is extremely important, Mr. Chairman. It is simply whether the Congress will review the work-product of the Commission which it has created and to which it has delegated enormous powers. Ultimately Congress is responsible to the people. Elected officials must exercise their responsibility as watchdogs over the unelected bureaucracies. We should not hide behind delegation of authority.

The proposed regulation in question deals with automobile merchandising across the Nation. To enforce the rules it will take the creation of, or certainly the addition of a new bureaucracy. Compliance will cost the consumers hundreds of dollars and will be of dubious benefit. As we know, conditions vary across our Nation. For this reason, regulation of this business would better be done on a State-by-State basis. If, however, some compelling argument were presented which persuaded us that nationwide regulation should be implemented, it should be dealt with directly by the Congress rather than the bureaucracy.

Let me say that the controversy that surrounds this issue and similar issues is such that this issue should be dealt with by Congress. There should be a roll-call vote. This will be a clear signal to the FTC in other areas that they might be considering similar Federal regulations.

Mr. Chairman, I have long supported the concept of legislative veto, for I believe Congress should have authority to review regulations which many times are well beyond the intent of this legislative body. I have frequently heard from South Dakota's small businessmen and consumers alike who are frustrated with a never-ending array of Government regulation. As their elected officials, we often do not have the freedom to easily revise these regulations. Fortunately, we do have the means to do so in this case because of the legislation passed by Congress last year, which I cosponsored, that gave us the opportunity to review such proposed regulations.

In the past year and a half, nearly 10 percent of the franchised automobile dealers in my State of South Dakota have been forced out of business. High interest rates and Government regulations are crippling the small businesses. On the national scale, over 2,500 franchised automobile and truck dealers have gone out of business in the past 24 months. Over 125,000 dealership employees have lost their jobs. New car sales have drastically declined, and a great number of franchised new car dealers have been forced to rely on other sales just to survive.

In these kinds of economic hardship, a dealer may shortly be finding himself faced with a $10,000 noncompliance penalty for a regulation which is not only unnecessary, but also extremely difficult to interpret. In fact, in many cases it would be difficult for a

dealer to know if he is in compliance or not, under the proposed FTC regulations.

At the outset, neither the Magnuson-Moss Act nor the legislative history authorized the Federal Trade Commission to promulgate a rule which requires a dealer to inspect motor vehicles or which requires disclosure of known defects by dealers. The clear intent of the act is to require warranty disclosure. Despite repeated expression of concern by both the House and Senate Committees on Commerce, as well as expressions of concern by a number of individual Senators and Congressmen, the Commission has decided to issue a rule which clearly fails to comply with congressional intent in this matter. The Commission did include in its rule a warranty disclosure provision, as intended by Congress, but it also included provisions which go far beyond the congressional direction given to the Commission.

These provisions require dealers to disclose defective components through a sticker on the window of the vehicle. The text of the rule makes it clear that the defect disclosure required of dealers applies even if the dealer does not have actual knowledge of the specific defect in the vehicle. This requirement of the rule applies if the dealers have facts or information about the condition of the vehicle which would lead a reasonable person under the circumstances to conclude that the car contained one or more of the defects listed in the rule.

If a dealer has reason to believe from the appearance of a car, or the way that it drives, that there is some defect in the vehicle, he must, in many cases, inspect the vehicle in order to identify the specific defect so that he can comply with the disclosure requirements of the rule. This demonstrates a total disregard by the FTC of the clear and numerous directions given by Congress.

In the 96th Congress, the report of the Senate Committee on Commerce, Science, and Transportation on S. 1991, the FTC authorization bill, stated that the Commission may not require a mandatory warrant or inspection in connection with the sale of a used motor vehicle. In the same Congress, the additional views in the House report to the Federal Trade Commission Improvements Act of 1979 gave the same direction to the Commission on this point. It stated:

> Congress never intended to give the Commission authority under the provisions of Public Law 93-637, or any other provision of law, to require inspection of vehicles or to require that any used motor vehicle or any of its components be warranted.

Currently, dealers of previously owned automobiles account for about 50 percent of the sales in this market, yet the FTC has issued a rule which applies only to dealers. It leaves the other 50 percent of the market unregulated. The FTC has created an artificial competitive disadvantage to the dealer when he is already faced with today's economic problems. The regulation in question will mean additional paperwork to the dealer and a higher cost to the consumer.

With the legislative veto, we now have the authority to stop implementation of this regulation which is not warranted. I would like to urge the subcommittee to favorably report this resolution to the full committee, so that we might quickly move to disapprove this rule.

Mr. Chairman and members of the committee, I thank you very much. I will summarize by saying that I think that the key issue here is Federal regulation. Do we want to enter into this area that is so crucial at a time when both parties and everybody is giving lip services, at least, to lessen Federal regulation? I thank the committee.

Senator KASTEN. I thank the Senator for his presentation. We are going to try, if we can, to limit Senators' questions to 5 minutes, and we will try to go through two rounds of questions, if that is acceptable to the members of the subcommittee.

Senator Cannon?

Senator CANNON. Thank you very much, Mr. Chairman.

Senator Pressler, I want to compliment you on your presentation and your initiating of this action. I must say, I have been very heavily involved in the deregulation aspect, having been the author of the airline deregulation bill and then having been involved in the trucking deregulation and the rail deregulation, and the telecommunications efforts. I certainly believe in less regulation.

I must say that initially I had some mixed emotions as to whether we ought to have a congressional veto in these instances or whether we ought to get at the problem by oversight of the various agencies in an oversight hearing. My reluctance has been overcome now and I also support the congressional veto approach.

I may say that in light of some of the actions that have taken place in the not-too-distant past, I would almost lean toward a one-house veto rather than the two-house veto. Generally, at least in many instances, those abuses take place as a result of over-ambitious agency staff people going out on their own to try and make a name for themselves. We saw a very good example of that last year in this committee, when we observed the FTC staff taking it upon themselves to come out with a staff study of the insurance industry that was very damaging to the industry. It did not address the point that was at issue properly, and it resulted in the Congress taking specific action to curtail the activities of the staff and the Commission in that regard.

I want to compliment you for at least giving us the opportunity now, through the presentation of this resolution of disapproval, so that we can hear both sides of the question and then make a judgment as to whether we do or do not want to overrule the proposed rule that has been presented.

Thank you very much.

Senator KASTEN. Senator Gorton?

Senator GORTON. No questions.

Senator KASTEN. Senator Long?

Senator LONG. No questions.

Senator KASTEN. Senator Danforth?

Senator DANFORTH. No questions.

Senator KASTEN. Senator Pressler, is it your understanding that most States have laws now in effect which cover this basic problem?

Senator PRESSLER. I could supply the committee with more specific information, but is my understanding that most States have some sort of laws addressing this. Certainly if there is a need for improving those laws, I would like to see it done at the State level.

When we enter the area of regulation of this sort, conditions vary from one part of the country to another. For example, in my State of South Dakota, it is critical what kind of antifreeze unit and what kind of radiator and heater a car has got, which probably would be quite the opposite in some States such as Florida and California, where such a thing as a heater is probably little used. So you do have different standards and different requirements from Alaska to Florida in terms of what is needed. I really feel that this is a matter that the State legislatures could address, and in many cases they have addressed it.

I think the fine words regarding the activities of one Senator's State are good, if the citizens of a State want this regulation, then they can have it through their State legislatures. I do not think it is a proper thing for the Federal Government at this time to get into the business of adding another major layer of Government bureaucracy and regulation.

It also opens up a whole area for litigation. The rules are so vague that there would be, I think, endless litigation, costs that would ultimately be passed on to the consumer.

Senator KASTEN. Senator Pressler, I would like, on behalf of the subcommittee, to thank you for your presentation and invite you to join us as a member of our committee for the rest of the morning, if it is possible for you to do that.

Senator PRESSLER. Thank you very much, and I want to compliment the members of the committee for considering this so promptly. We have to do this before Christmas, I believe, under the 90-day rule. I want to thank the members of the committee for considering it and for being present to move it, at least get it to the Senate floor. And I might say that we probably could have gone the discharge route, or something, or brought it direct to the floor. But I want to compliment the chairman for his willingness to hold a prompt hearing so that we do this properly. It is the first time this two-house veto has been used. It is a historic thing for your subcommittee.

I thank you very much.

[The statement follows:]

STATEMENT OF HON. LARRY PRESSLER, U.S. SENATOR FROM SOUTH DAKOTA

Mr. Chairman, I would like to express my sincere appreciation to the Subcommittee for holding hearings so promptly on Senate Concurrent Resolution 33 which I introduced in the Senate on September 15 and which has now been cosponsored by 35 of our colleagues. I ask that a list of the cosponsors be placed in the hearing record. As I know you are aware, this resolution disapproves a recently promulgated rule by the Federal Trade Commission which could have a severe effect on small businessmen around the country.

In the last decade we have seen increasing regulation of our way of life by Washington. Small business, as well as big business, has felt this impact. Much of this regulation has not come directly from Congress but rather from the independent regulatory agencies operating frequently under vague guidelines of authority delegated by the Congress. Because of the increasing frustration of Americans with burdensome regulations, Congress has begun to re-examine and reduce the authority it delegates the agencies. One of the results was the Federal Trade Commission Act of 1980 which contained a two-house veto provision for rules issues by that agency.

The resolution which we are considering today is based upon this legislation. I believe the principle behind this issue is extremely important, Mr. Chairman. It is simply whether the Congress will review the work product of a commission which it has created and delegated enormous powers. Ultimately, Congress is responsible to

the people. Elected officials must exercise their responsibility as watchdogs over the unelected bureaucracies. We should not hide behind a delegation of authority.

The proposed regulation in question deals with automobile merchandizing across the nation. To enforce the rules, it will take the creation of—or certainly the addition of—a new bureaucracy. The cost of compiling will cost the consumers hundreds of dollars, and will be of dubious benefit.

As we know, conditions vary across the nation. For this reason, regulation of this business would be better done on a state-by-state basis. If, however, some compelling argument were presented which persuaded us that nation-wide regulations should be implemented, it should be dealt with directly by the Congress rather than by the bureaucracy.

Mr. Chairman, I have long supported the concept of legislative veto, for I believe Congress should have authority to review regulations which many times are well beyond the intent of this legislative body. I frequently heard from South Dakota small businessmen and consumers alike who are frustrated with the never-ending array of government regulations. As their elected officials, we often do not have the freedom to easily revise these regulations. Fortunately, we do have the means to do so in this case because of the legislation passed by Congress last year, which I cosponsored, that gave us the opportunity to review such proposed regulations.

In the past year and a half, nearly ten per cent of the franchised automobile dealers in South Dakota have been forced out of business. High interest rates and government regulations are crippling these small businesses. On the national scale, over 2,500 franchised automobile and truck dealers have gone out of business in the past 24 months and over 125,000 dealership employees have lost their jobs. New car sales have drastically declined, and a great number of franchised new car dealers have been forced to rely on other sales just to survive.

In these times of economic hardship, a dealer may shortly be finding himself faced with a $10,000 non-compliance penalty for a regulation which is not only unnecessary, but also extremely difficult to interpret. In fact, in many cases, it would be difficult for a dealer to know if he is in compliance or not under the proposed FTC regulations.

At the outset, neither the "Magnuson-Moss Act" nor the legislative history authorize the Federal Trade Commission to promulgate a rule which requires a dealer to inspect motor vehicles or which requires disclosure of "known defects" by dealers. The clear intent of the Act is to require "warranty disclosure."

Yet, despite repeated expression of concern by both the House and the Senate Committees on Commerce, as well as expressions of concern by a number of individual Senators and Congressmen, the Commission has decided to issue a rule which clearly fails to comply with Congressional intent in this matter.

The Commission did include in its rule a warranty disclosure provision as intended by Congress, but it also included provisions which go far beyond the Congressional direction given to the Commission. These provisions require dealers to disclose "known" defective components through a sticker on the window of the vehicle. The text of the rule makes it clear that the defect disclosure required of dealers applies even if the dealer does not have actual knowledge of the specific defect in the vehicle. This requirement of the rule applies if the dealers has "facts or information about the condition of a vehicle which would lead a reasonable person under the circumstances to conclude that the car contained one or more of the defects listed" in the rule.

As a result, if a dealer has reason to believe from the appearance of a car or from the way it drives that there is some defect in the vehicle, he must, in many cases, inspect the vehicle in order to identify the specific defect so he can comply with the disclosure requirements of the rule.

This demonstrates a total disregard by the FTC of the clear and numerous directions given it by the Congress. In the 96th Congress, the Report of the Senate Committee on Commerce, Science and Transportation on S. 1991, the FTC Authorization Bill, stated that the Commission "may not require a mandatory warrant or inspection in connection with the sale of a used motor vehicle." In the same Congress, the Additional Views in the House Report to "The Federal Trade Commission Improvements Act of 1979" gave the same direction to the Commission on this point. It stated: "Congress never intended to give the Commission authority under the provisions of Public Law 93-637 or any other provision of law to require inspections of vehicles or to require that any used motor vehicle or any of its components be warranted."

Currently, dealers of previously owned automobiles account for only about 50 per cent of the sales in this market. Yet the FTC has issued a rule which applies only to dealers and leaves the other 50 per cent of the market unregulated. The FTC has

created an artificial competitive disadvantage to the dealer when he is already faced with today's economical problems.

The regulation in question will mean additional paperwork to the dealer and a higher cost to the consumer. With the legislative veto, we now have the authority to stop implementation of this regulation which is not warranted.

I would like to urge the Subcommittee to favorably report this resolution to the full Committee so that we might quickly move to disapprove this rule.

Senator KASTEN. The next witness is Hon. Patricia P. Bailey, Commissioner, Federal Trade Commission.

We are pleased to have you join us this morning. We would like to ask you to proceed with your prepared testimony, and then there may be some questions from the members of the subcommittee.

STATEMENT OF HON. PATRICIA P. BAILEY, COMMISSIONER, FEDERAL TRADE COMMISSION, ACCOMPANIED BY KATHERINE MAZZAFERRI AND SUSAN LISS

Ms. BAILEY. Thank you, Mr. Chairman and members of the committee. I appreciate the opportunity to appear here today for the Federal Trade Commission to discuss the trade regulation rule promulgated by the Commission concerning the sale of used motor vehicles. Chairman Miller, our new member, is not participating in this testimony.

Accompanying me this morning are Katherine Mazzaferri, Assistant Director for the Division of Product Reliability, who supervises the staff work, and Susan Liss on my right, who is the lead attorney on the rulemaking staff. Following my testimony, Ms. Mazzaferri and Ms. Liss will remain available to answer any questions that you may have in the course of the hearing. I would ask permission to submit my written testimony for the record, Mr. Chairman. I have it here, and I would only summarize that testimony here.

Senator KASTEN. Without objection, so ordered, and I thank you for your offer of summarizing.

Ms. BAILEY. The used car proceeding was undertaken 5 years ago, following the enactment of the Magnuson-Moss Warranty Act, which directed the FTC to initiate a rulemaking proceeding with respect to the sale of used cars within 1 year of the act's passage, and to prescribe a rule dealing with used car warranties and warranty practices. That law further stated that in issuing such a rule, the Commission could, and I quote, "exercise any authority it may have under this title or other law."

Section 111 of the act specifically provides that the act was not intended to repeal, invalidate or supersede the Federal Trade Commission Act. The Commission thus concluded, we believe correctly, that any used car rule could be promulgated under both the Magnuson-Moss Warranty Act and the FTC Act or other laws the Congress had directed the Commission to enforce. As a direct result of that statutory instruction, the Commission published an initial notice of proposed rulemaking in January 1976.

During the course of the years that followed, the Commission considered several remedial approaches to a pattern of deceptive practices found to exist in the used car industry. The Commission first considered, as you know, and then rejected a rule which would have mandated inspection of all used cars and the disclosure of the

results of those inspections to consumers. The Commission later considered a rule that would have, in effect, made such inspections optional but would have forced dealers to disclose whether any inspection had occurred or not, and if they had occurred, to disclose the results. The Commission rejected both the mandatory and the optional inspection approaches, and instead promulgated a rule which focuses essentially on warranty information and other disclosures.

The rule promulgated in August of this year, on the basis of a 4½-year proceeding, is quite straightforward and uncomplicated. Its requirements are contained entirely in the sample window sticker which is attached to my testimony. The rule requires that dealers complete the sticker with the information already in their possession and post the stickers in the window of each used car offered for sale.

The sticker discloses that spoken promises are difficult to enforce; that prepurchase inspections by an independent third party may be permitted; either that the car is being sold "as is" or the extent of any warranty coverage for the car's major systems and any specific major defects in the car, of which the dealer is aware. The back of the sticker lists the totality of major defects that dealers must disclose if they know about them.

My written testimony, I believe, reveals the soundness of the Commission's 4½ year proceeding. In all, over 3,500 public comments were received and analyzed. Hearings were conducted in six cities with 212 witnesses, and the total record of the proceeding exceeds 50,000 pages. That record is complete and fully supports, in a legal sense, the rule promulgated by the Commission.

We also believe the rule is carefully tailored to the reality of the used car marketplace, and is the least costly and least intrusive means of dealing with the abuses documented in the record, and thus is fully supportable in a policy sense.

The record shows that the two major problems most frequently complained about, and which are apparently the most widespread in the industry, are a dealer's oral misrepresentations about a car's mechanical condition at the time of sale; and lack of information about any warranty coverage, or misrepresentations about a dealer's responsibility to repair a car. This rule is designed to get at those problems by the device of requiring disclosure of information, and only information which is already in the hands of the dealer. Let me devote the balance of my remarks to some of the criticisms of the rule which we understand to exist.

First of all, most of the controversy clearly centers around the rule's requirement that a dealer disclose known defects or defects in a car's major mechanical or safety system at the time of sale that the dealer already knows about. I want first to point out that while the defect disclosure provision may now be a source of criticism from the industry, that was not always the case. Defects disclosure has been a part of the rulemaking discussion since its inclusion in the first rulemaking notice in 1976.

And in comments on the rule filed in February 1979, the National Independent Automobile Dealers Association, which will be testifying here later today, wrote:

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It is always difficult and often impossible to determine the exact condition of a used product. Its parts are worn, and may have been subjected to abusive treatment by previous owners. Neither buyer nor seller can ever be certain that some latent defect which evaded discovery will not surface after resale. Disclosure of significant known defects, however, would ensure that consumers who possess the same information as the dealer about a car's condition could bargain for a reasonable price and warranty coverage to reflect the car's known mechanical condition. NIADA believes that the balance between consumer and dealer knowledge can be achieved by means of a rule requiring a window sticker which would disclose both significant known defects and defects discovered during any state-required safety inspection. By "significant known defects," we mean all defects which the dealer is personally aware of, other than cosmetic or minor defects.

Now, the National Automobile Dealers Association, which will also appear before you today, while not positively or affirmatively supporting a defect disclosure rule, nevertheless in the context of objecting to the Commission's potential promulgation of a rule which required inspection, said that the least intrusive possible way to get at the problems that the Commission was trying to reach would be to require instead disclosures of known defects.

Second, despite widely disseminated press accounts of a the Commission's final decision to reject both the mandatory and the optional inspection rules, there is a continuing misperception that the rule requires dealers to conduct inspections of the cars they offer for sale. The rule does not require dealers to inspect cars offered for sale. To emphasize that, the rule contains language which states specifically: "You are not required to inspect. You are required to disclose on the buyer's guide any defects set forth below, if known."

In every possible way, the Commission has tried, and is trying, to make it clear that a dealer would only be liable for failure to disclose if actual events occur that would have led a reasonable person to conclude that a defect exists, and in any event, no dealer who makes a good faith effort to comply with this rule risks prosecution by the FTC, nor is the Commission interested in occasional errors or inaccuracies. We would only be interested in an enforcement context if a pattern of abuse began to show up involving an individual dealer.

Let me also address the assertion that the disclosure of known defects somehow would override or supersede state law allowing "as is" sales. That is not true. More than half the used cars sold in the country are purchased and sold "as is." Our record reveals that many purchasers do not understand what "as is" means. It means that the dealer has no obligation to repair anything that goes wrong after a car is purchased and driven off the lot. "As is" sales are perfectly legal in 41 States, and that is true now, and it remains true, whether existing defects are disclosed or not.

The alternative to this rule, which would require disclosure if the car is sold "as is," and an explanation of what that means as well as a list of known defects—the alternative to the rule is disclosure neither fact. And that is what the record shows.

It seems to us, Mr. Chairman and members of the committee, that the potential for consumer injury is greater today than it was when the Congress directed the Commission to consider promulgating a used car rule. Used car sales are increasing dramatically, and that trend is likely to continue.

The average price of a new car today is $10,000. Without the rule, those who will turn increasingly to the used car market may turn in record numbers to the FTC and to State and local law enforcement agencies to complain about misrepresentations, fraud, and deception resulting from these purchases. With this rule, consumers will have the information they need to decide whether to purchase a used car at the price and with the warranty coverage offered by the dealer.

I would like to say—and I will echo your previous comments—that this is the first rule promulgated under the Commission's Magnuson-Moss authority to be subject to the legislative veto provisions contained in the FTC Improvements Act of 1980. And in that sense, all of us here today are pioneers in the legislative veto process. For that reason, the Commission is especially pleased to have this opportunity to testify.

We believe that the rule we have promulgated is soundly based on a complete record, and is the least intrusive possible way to correct the substantial abuses documented in the record. According to the detailed cost-benefit analysis prepared by our Bureau of Economics, the cost of complying with the rule should be minimal. We estimate that the price of printing the sticker will be somewhere between 15 and 20 cents apiece, and that the limited amount of time necessary to fill it out are the only costs directly traceable to the rule's requirements.

We hope that after the committee reviews the rule, and after this proceeding, you, too, will reach the conclusion that no congressional action is required under the legislative veto provisions, so that this rule may proceed to having its day in court.

Now, I will be glad to answer any of your questions, if I can.

Senator KASTEN. We are giving the rule its day in court right now. Or maybe this is the pretrial; I am not a lawyer.

Senator Boschwitz from Minnesota cosponsored the disapproval resolution, and in his statement in support he said, and I quote: "The clear thrust of this proposed rule is entirely negative." I share his concern for the tone of the sticker, in particular. It begins "Used car buyer's guide. Important. Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form."

Now, the clear implication is that the used car dealer cannot be trusted. You should be wary, and you should be on the alert, and don't believe a thing he says unless he puts it in writing. Now, I don't think that tone is appropriate. It might be appropriate for one or two dealers, but not for the overall group of dealers. I guess you would say you seek to alert consumers, but others would say that you are beating up responsible used car dealers. The whole tone of the rule is that this whole area is just filled with crooks. I don't believe it is.

Ms. BAILEY. I don't, either.

Senator KASTEN. Is it necessary to imply to consumers in such an alarming way that dealers may break spoken promises and dealers are seeking to mislead them?

Ms. BAILEY. It was not the intention of the Commission to have a sticker which was negative in tone, or to make any suggestions about used car dealers. I don't know a soul who goes to buy a car,

used or new, who is not very alert and careful as they approach the transaction. The purpose of the language in that position is to address the main problem that shows up in the record, and that is that dealers in widespread cases make oral misrepresentations about a car's mechanical condition, which consumers, the record shows, rely on.

So the purpose there was simply to say it will be difficult to come back later and try to prove that somebody said something, so ask them to put it in writing if it is important to the purchasing decision. That's the point of the language.

There was no intention on our part that the sticker be negative. In fact, it seems to me it is somewhat reassuring to a buyer or a potential buyer to have the sticker on used cars, because of the information that it contains. It is designed to be neutral, undramatic, and also we have tested it with groups of people to see how they understand it, and we have not ever been told by consumers that they find it is a negative document, or that it says anything of the kind that you suggested it might.

Senator KASTEN. Most States have some kind of consumer protection law, in some cases "little FTC acts" that mirror the Federal statute. In Wisconsin, there is a comprehensive rule governing used cars, as you mentioned in your testimony.

Why do we then need a Federal rule? Can't States make the decision about how to protect consumers within their borders? Aren't States in fact doing it?

Ms. BAILEY. Mr. Chairman, I guess there are several answers to that question. Certainly Wisconsin is doing it, there's no doubt about that. A good deal of the parts of this rule, especially portions of the list of mechanical defects on the back of the form, come directly from the Wisconsin rule, and the experience in the State of Wisconsin.

Yes, the answer is yes, the States could do it. Wisconsin is the only State that did it earlier, and has a law that has been in place for awhile. The other State that has a used car rule, which also is, I might say, requiring defect disclosure, known defects, is the State of Maine. That is a new law.

In the case of States like Wisconsin, which pioneer rules in this area, ones that we will look at very closely, Wisconsin and other States, which have or decide to promulgate any rule in this area, which provides at least the minimal protection that is provided in this rule, can apply for and will be exempted from the rule's coverage by the Commission. I think it is also important for you to know that we did have the input of 29 officials from 29 States during the rulemaking proceeding. Twenty-nine people came and testified as part of the proceeding, and in 27 cases, they favored the rule. The two who opposed it opposed it because they thought it ought to include inspection, and that it was too weak.

So we have been asked by State officials to do this kind of rule to address what they believe—and we agree—is a nationwide problem, which, however, if States do act, they can be exempted from.

Senator KASTEN. Senator Cannon.

Senator CANNON. Thank you, Mr. Chairman. First, let me ask that Senator Heflin's prepared statement be made a part of the record.

Senator KASTEN. Without objection, it will be made part of the record.

[The statement follows:]

STATEMENT OF HON. HOWELL HEFLIN, U.S. SENATOR FROM ALABAMA

As the subcommittee begins its hearing on the Federal Trade Commission's most recent used car trade rule, I wish to commend the chairman for his initiative in recognizing the importance of this issue to the thousands of used car dealers across this country and the need to have a thorough examination of its merits and ramifications.

The FTC has once again overstepped the bounds of its authority in regulating the sale of used cars. Not only does the latest trade regulation pomulgated by the FTC attempt to place an unworkable and costly regulatory burden on the shoulders of the used car dealer, it also clearly circumvents the expressed intent of Congress.

In 1974, Congress passed the Magnuson-Moss Warranty Federal Trade Commission Improvement Act. Part of that act directed the FTC to promulgate rules dealing with warranties and warranty practices in connection with the selling of used cars. In December 1975, the FTC published a proposed rule requiring a window sticker disclosure on used cars which are offered for sale by a dealer. This rule also required a mandatory inspection of the car by the dealer and a disclosure of the inspection results.

In response to this regulation, the Senate adopted a provision, as part of the FTC Improvement Act of 1979, prohibiting the Commission from requiring mandatory warranties or inspection in connection with the sale of used cars. In the Commerce Committee report which accompanied the bill, the committee stated the following: "Congress never intended to give the Commission authority under the provisions of Public Law 96-637 or any other provision of law to require inspections of vehicles or to require that any used motor vehicle or any of its components be warranted." The House, in its report, also expressed its disapproval of the FTC regulation.

On May 16, 1980, the FTC adopted an "Optional Inspection" rule which required a dealer to disclose through a window sticker any warranty coverage and the condition of fourteen automotive systems. Though this was some improvement on its earlier regulation, the FTC again failed to comply with the intent of Congress by requiring mandatory inspection. In response, I joined with fifty of my colleagues in a letter to the FTC disapproving this regulation.

On August 14, 1981, the FTC issued its latest rule in this area. This regulation once again fails to comply with the direction and intent of Congress by requiring dealers to disclose known defective components through a window sticker. There are several problems with this latest regulation. First, Congress has strictly prohibited any regulation that directly or indirectly mandates inspection of the car. The language of this new regulation states that a dealer, or his agent, has knowledge of a defect if they have "obtained facts or information about the condition of the car that would lead a reasonable person to believe the car contained one or more defects." The dealer is clearly being forced to conduct an inspection of the car in order to discover the specific defect.

Second, the regulation has the effect of requiring dealers to offer implied warranties on cars offered for sale. By marking known defects, the dealer is implying that other aspects of the car are acceptable, thus creating an implied warranty. As I pointed out earlier, Congress has stated that the FTC may not require a warranty on the sale of used cars.

Not only is this regulation in direct conflict with the mandate given the FTC by Congress it also has the potential to cost the used car dealer hundreds of dollars per car. At a time when small businesses all across this country are strugging to survive under the weight of spiraling interest rates and an uncertain financial climate, I don't believe the Federal Government should be forcing on them additional regulatory burdens. Furthermore, these additional costs will ultimately be passed along to the consumer.

I look forward at today's hearing to a thorough and extensive examination of all the issues surrounding this latest trade rule promulgated by the FTC.

Thank you, Mr. Chairman.

Senator CANNON. On a lighter note, may I ask whether the fact that you are a woman and you have two such lovely female assistants here with you indicates that there is a pattern of discrimination against men down at the Commission?

Ms. BAILEY. Not in totality. Only with regard to certain projects.

Senator CANNON. My problem here is not that of a disclosure of known defects, but the legal implications that might require the dealer to inspect, or also be liable for a warrantee.

Senator Heflin, in his paper that I just made part of the record, raises this point. He says the regulation has the effect of requiring dealers to offer implied warranties on cars offered for sale. By marking known defects, the dealer is implying that other aspects of the car are acceptable, thus creating an implied warranty. As I pointed out earlier, Congress has stated that the FTC may not require a warrantee on the sale of used cars. Now, in the committee report, when they considered this matter before—let me read part of the report to you:

> The Committee believes that the Magnuson-Moss Act, as written, prohibits the FTC from mandating warranties for used cars. In this respect, the amendment merely reiterates existing limitations on FTC authority. Furthermore, the prohibition against mandatory inspections and warranties for used cars is directly related to the above restrictions. A mandatory inspection and checklist requirement would have the effect of creating express warranties under State law. Therefore, a prohibition against mandatory inspections merely insures that the FTC does not accomplish through indirect means that which it is prohibited from doing directly.

Now, I would like to follow on with a question on your Illustration 5, which is contained in the rule, and it reads as follows:

> A used car dealer performs no inspections on a car he or she offers for sale; nevertheless, the dealer sees a trail of radiator coolant left by a car recently driven into the dealer's lot for purchase or resale. In this situation, the dealer has knowledge of a defect.

Now, there are several defects listed in the rule which could cause a car to leak radiator coolant. Among them are: Engine cracked block; cooling system leakage, including the radiator; and a cooling system—improper function of the water pump. All of those might cause the obvious problem of coolant leaking from the car, the obvious evidence of some kind of a defect. Now, the dealer cannot know which of these defects is causing the condition, unless he inspects the vehicle, and he cannot comply with the requirements of the rule unless he discloses the specific defect.

Now, in a staff briefing, I understand the FTC staff has said that the dealer would not have to determine the specific defect that is causing this condition, but could merely list cooling system leakage, including radiator, and thereby comply with the requirements of the rule; is that correct?

Ms. BAILEY. Could I back up a little? You have really asked several questions, and I want to wind up with that example.

On the question of whether warranties arise under State law, it was, as you may recall, one of the problems that was facing the Commission just about the time I arrived—which was 2 years ago yesterday—was the question of whether even under the optional inspection rule certain requirements would cause warranties to arise under State law.

The Commission knew that that was not permitted by the Magnuson-Moss Act, and we were extremely concerned about that point. I recall that as being one of the problems when I arrived. I believe that has been solved. I know it has been solved.

Now, as to the question of whether implied warranties arise under State law, if defects are listed and therefore there are impli-

cations as to whether implied warranties exist with respect to other systems that are not listed as affected, the answer is that no warranties will arise under State law. Specifically, we tried to take care of that and make it clear on the sticker itself. If you look at the language, it says very clearly that the defects—that the only defects that are disclosed here are defects that the dealer knows about. And there may be defects now known to the dealer. And if nothing else is listed, the car is not necessarily free of defects.

The point there—and the effort was to make it clear that implied warranties with respect to systems not listed do not arise as a result of listing those that the dealer knows to be defective.

As to the question of the radiator coolant, and how we deal with that problem—I regard that example as one of several kinds of problems that we will have to address during the 6-month period after the rule is given final approval, before it becomes effective. Its effective date is 6 months after final approval.

The point of the rule obviously, Senator Cannon, is that if a dealer has a car on the lot that came onto the lot leaking radiator coolant, the dealer should disclose to the potential buyer that the car leaks radiator coolant. That is the purpose—only that the potential buyer would know of the problem that the dealer knows about.

I think the categories that are listed on the back are fairly basic. If they are not clear in any specific instance, nobody wants the dealer to guess, and so I think that what we have to do during the 6 months is to talk to dealers and to work out compliance guides to make it clear what it is that the rule is trying to do and under what conditions a dealer would not be liable for trying to describe a problem that showed that a defect existed but the dealer was not going to inspect and so did not know the exact cause of the defect.

As a practical matter, if I were selling a car, I might want to know myself, for it might affect the price that you could sell it for if the defect was minor and you wanted to repair it first or something like that. But that would be a business decision and not one required in order to comply with the rule.

Senator CANNON. But you are indirectly requiring him to inspect if you follow that.

Ms. BAILEY. No. I'm recognizing a business reality.

Senator CANNON. Then if he inspects, then he is liable, because he has not disclosed that. He may make his inspection to find out what the real cause was. If he finds out it is a cracked engine block, obviously he has got to disclose that. But on the other hand, if he just makes the disclosure that you say here, "cooling system, leakage including radiator," it may be a cracked block, and yet he has not provided the consumer with all of the information that the consumer should have, and therefore it is misleading.

Ms. BAILEY. Well, I recognize that. But there are cars sold all the time with existing defects that nobody knows about, certainly not the buyer, and the rule does not require the seller to discover whether an engine block is cracked.

What I'm trying to say is, if the point is to disclose what the dealer knows and what the dealer knows indicates that there is a problem and the problem is leaking radiator coolant, we will work

out a way that that kind of thing can be expressed on the sticker with no liability arising for the dealer.

Senator CANNON. And it says in deciding whether the dealer should disclose the defect, the dealer must "treat all vehicles the same and not use lower standards for older or cheaper vehicles."

Isn't that absurd to say that you have to treat a 10-year-old vehicle the same as a 1-year-old vehicle with respect to the standards in determining the normality of the car?

Ms. BAILEY. The conclusion that we made there was that a defect is a defect, a cracked engine block is cracked, whether the car is a 1 year old or 6 years old. And it would be impossible, I think, to try to put into this rule some differentiation of standards with respect to the age of cars. It seems to me then it would really make it impossible for dealers to try to comply.

The answer is, I guess, to disclose them no matter how old the car is and then to bargain over the price, depending on the age of the car.

Senator CANNON. It seems to me that that sort of leaves it pretty wide open when you say that they should not use lower standards for older or cheaper vehicles, that you really have got a door there that you can drive a truck through.

Ms. BAILEY. We're not saying that these cars have to be inspected and they all have to meet certain standards. This is not the Wisconsin law that requires inspection and repair of any safety defect and repair of any defect that shows up within a certain amount of time after the car is sold. This is not that kind of rule. It does not say old cars have to be in as good a condition as newer cars. It just says that if a defect exists in the car, whatever its age, it must be disclosed if the dealer knows about it.

Senator CANNON. Well, it seems to me that this rule needs a great deal of clarification. Conscientious dealers would have to bear the cost of an inspection in order to minimize legal liability for a rule violation due to the complexity and ambiguity of the known defects provision. That is the big concern that I have. That is $10,000 liability per violation. That is pretty serious liability to impose on a dealer.

Thank you, Mr. Chairman, my time is up.

Senator KASTEN [presiding]. Did you want to respond?

Ms. BAILEY. Yes. My basic response, Senator Cannon, is, I understand that concern. But inspection is not required by this rule, so that dealers are not liable for failing to inspect. That is the short answer to the question, but I understand the concern.

Senator KASTEN. Senator Long?

Senator LONG. I was inclined to be against your position until I heard your statement, but you have a good point here. If a used car dealer is worth his salt, when he goes to buy a car, he is going to inspect it, and he knows how. He knows to look at the tires, and if he finds that the tires on one side don't match the tires on the other side and they are on bad shape and won't last 200 miles, he is the kind of fellow who would look for that. And he could say, "I can't give more than $1000 for the car. There's a fan belt missing. The hoses are in bad shape. You ought to replace all of them. The radiator leaks. The battery's in bad shape. The fuel system leaks; the gauges don't work." And he can get the car cheap for $1,000 or

maybe $500. You say, "It will take $2,500 to fix it up, and it will be decent to drive."

And having told the man all that, he knows about it. And then some little lady comes in and doesn't know a thing about mechanical things, and he tells her, "It's a fine automobile. It's in great shape." And she is lucky if she can get the thing out on the highway at all.

So it seems to me, if he knows about all of these things, he ought to be required to disclose it. Then he would have an equal competitive advantage with all the other people.

Ms. BAILEY. Yes.

Senator LONG. So it seems to me that the people in the used car business are going to inspect—they're not going to bring in an outside mechanic, but they will look the cars over, and they know what to look for.

They probably tell that to the person who is selling to them to get the price down.

Ms. BAILEY. The record shows, too, Senator, that the dealers get most of their cars in two ways. One of those ways is at auctions. The rules of those auctions often require defect disclosure by the sellers to the buyers and also incorporate a provision which allows the buyers after buying the cars and inspecting them to rescind the sale if they find things wrong with the car that makes it not worth the price they paid for it.

In addition, it seems that if a dealer wants to offer any kind of warranty coverage, if I were a dealer, I would certainly want to know a lot about the car before I offered any warranties on it.

I am just saying that the record shows that they know a good deal about their cars.

Senator LONG. You are saying when they are doing business with one another, they do the kinds of things that you would like them to do when they are selling the car to the little old lady.

Ms. BAILEY. Yes, sir. I might be that little old lady one day.

Senator LONG. I think you'd know what to look for.

Ms. BAILEY. Maybe now. Last year, no.

Senator LONG. A lot of people, they're putting every nickel that they can say grace over into buying the used car, and it can be an absolute disaster for them to find out that this thing had some very serious defects and that fellow knew it and didn't tell them.

Ms. BAILEY. Yes. The information we have on the statistics of the market show, as a matter of fact, on that point that a very small percentage—I don't remember what it is—of new cars are purchased for actual family or personal use—less than 50 percent I believe. 95 percent of used cars are purchased for personal use. Information about used cars is all the more important, I think, to families, and the cost today is too important.

Senator LONG. I know a fellow who rents the old automobiles. What he tells his client is, "Look, all I tell you is that this thing will roll. When you start it, it will drive. And if it breaks down on you, we will provide you with another one."

Ms. BAILEY. That will roll farther.

Senator LONG. But if the used car dealer does that, it may not be so bad. But when the people are stuck with the car, they really ought to be required to disclose.

Shouldn't that be what this thing is all about? It seems that you have made it clear you do not want—it is not your intention to require that the dealer have an inspection of the automobile.

Ms. BAILEY. That's correct.

Senator LONG. If there's a problem about that, you would like to correct it. He has looked the car over; he's found a lot of things wrong with it. And where he knows that, you want him to disclose it.

Ms. BAILEY. Yes, sir, that's correct.

Senator LONG. Thank you.

Ms. BAILEY. Thank you.

Senator KASTEN. Senator Gorton?

Senator GORTON. Did I understand your written testimony, at least—I don't think that you adverted to this in your oral testimony—to the effect that in February of last year, the National Independent Automobile Dealers Association presented written comments to the Commission in opposition to the mandatory inspection proposal in which they stated that they wanted to be on record as favoring a rule requiring a window sticker which would disclose any significant defects known to the dealer?

Ms. BAILEY. Yes, sir. I did mention that in my remarks a few minutes ago. It is quite clear that that is what they said and made a recommendation to that effect, even in the form of a window sticker on which known defects would be disclosed. That was their recommendation.

Senator GORTON. Did NIADA at that time indicate to the Commission any position on the legal authority of the Commission to impose a requirement to disclose known defects?

Ms. BAILEY. Not to my knowledge, Senator Gorton.

Excuse me. The answer to that question is, yes, they did. They made affirmative representations that such a window sticker disclosing known defects would "meet the mandate of section 109(b) of the Magnuson-Moss Act." That was their position at that time.

Senator GORTON. Did NIADA at that time indicate to the Commission any position on the question of the effectiveness of warranty and known defect disclosures in eliminating the abuses which you found in making your record?

Ms. BAILEY. Yes. That association said that the disclosure of known defects would effectively eliminate substantially all of the alleged consumer abuses that were contained in the record and that they believed that the proposal would do that quite clearly as well as meet the mandates of the law, of Magnuson-Moss.

Senator GORTON. Who makes up the membership of NIADA?

Ms. BAILEY. To the best of my knowledge, that is a group of independent automobile dealers, as opposed or differentiated from franchised dealers that also sell used cars. That is my understanding.

Senator GORTON. It is a used car dealer group?

Ms. BAILEY. Yes, sir.

Senator GORTON. Was the form of disclosure recommended by NIADA the one adopted by the Commission?

Ms. BAILEY. No, sir, it wasn't. We adopted one that in our opinion was less burdensome in two ways. The major difference in the two was on the subject of known defects. We believe that the

Commission's rule reduces the dealer's burden or risk of noncompliance by making it more clear than NIADA's proposal which major defects were subject to the disclosure requirements NIADA's proposal had no specific list of defects which had to be disclosed, and the disclosure requirement would therefore have been open-ended and seemed to be a more difficult thing for dealers to do.

What we tried to do was to make it simpler, and so it is less burdensome than the one they proposed.

Senator GORTON. Essentially, when this organization was opposing mandatory inspections, it proposed a system which, if anything, was somewhat more burdensome than the regulation which you actually have before us at this time and which it said would be effective in getting rid of the abuses which caused this proceeding in the first place?

Ms. BAILEY. Yes, and which complied with the law in terms of the Commission's statutory authority.

The other thing I wanted to say about the NIADA sticker was that not only did it contain a requirement that known defects be disclosed, but when disclosed, it required that the dealer had an obligation to diagnose the causes of those defects, which clearly is not required by this rule.

Senator GORTON. Subjectively, would it be your view that if it is inappropriate for the Federal Trade Commission to regulate a retail business such as this—because the matter should be left to States or local communities—that the Federal Trade Commission will have essentially no valid retail consumer protection activities before it?

Ms. BAILEY. In any area, you mean?

Senator GORTON. Yes. The theory behind this.

Ms. BAILEY. That is the logical extension of that theory, yes.

Senator GORTON. Thank you very much.

Senator KASTEN. Senator Danforth?

Senator DANFORTH. Ms. Bailey, I think the last point made by Senator Gorton deserves to be underscored. It is my understanding that one of the principal arguments, if not the principal argument, made by the adversaries of this rule is that this should be a matter left to the States to regulate. It would seem to me, as apparently it does to Senator Gorton also, that precisely the same argument could be made with respect to virtually all of the consumer protection jurisdiction of the FTC, and therefore the essence of that argument—that this is a States' rights matter—is basically an argument against the consumer protection jurisdiction of the FTC, not against this particular rule.

Would you agree with that?

Ms. BAILEY. Yes, I would.

Senator DANFORTH. With respect to this same argument, concerning the role of the Federal Government in this general area, with respect to automobiles and the conditions of automobiles, the sale of automobiles and the production of automobiles, the Federal Government right now, without the FTC, is already in the business of regulating automobiles.

The National Highway Traffic Safety Administration has promulgated a series of regulations relating to automobiles. It is my understanding that Federal regulations now govern automobile

brakes, dashboards, seatbelts, windshield glass, steering columns, tires, lights. So wouldn't it be fair to say that the States' rights argument with respect to automobiles is not particularly appropriate, that the Federal Government through something of an extended tradition has gotten itself involved—for some time—in the business of regulation with respect to cars?

Ms. BAILEY. That's correct. And to a very large degree, those regulations apply to the manufacturers of new cars and sellers of new cars. To the degree that the Government will continue to be involved in many of those things, this is an area of the market that has not heretofore been touched by even a minimal kind of disclosure rule.

Senator DANFORTH. But cars, the condition of cars when they are sold to consumers, has not been beyond the reach of the Federal Government.

Ms. BAILEY. No; and indeed the disclosure sticker, the side that deals with safety defects, was developed itself by the Department of Transportation at the direction of the Congress in connection with highway safety standards and is used, I believe, as a guide in many States for inspection standards.

Senator DANFORTH. But the stickers on new cars relating to gas mileage—are they required by Federal law?

Ms. BAILEY. Yes.

Senator DANFORTH. I wonder if you could provide for the record a listing of Federal regulations relating to the sale of cars?

Ms. BAILEY. Yes; we can. We would be glad to do that.

[The following information was subsequently received for the record:]

FEDERAL REGULATIONS CONCERNING AUTOMOBILES

The following is a list of federal regulations concerning automobiles. Unless otherwise indicated, the regulations apply to automobile manufacturers rather than to automobile dealers.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

Vehicle Classification, 49 CFR 523
Exemptions from Average Fuel Economy Standards, 49 CFR 525
Reduction of Passenger Automobile Average Fuel Economy Standards, 49 CFR 527
Manufacturers of Multistage Automobiles, 49 CFR 529
Automotive Fuel Economy Reports, 49 CFR 537
Procedural Rules, 49 CFR 551
Petitions for Rulemaking, Defect and Noncompliance Orders, 49 CFR 552
Rulemaking Procedures, 49 CFR 553
Standards Enforcement and Defects Investigation, 49 CFR 554
Temporary Exemption from Motor Vehicle Safety Standards, 49 CFR 555
Exemption for Inconsequential Defect or Non-Compliance, 49 CFR 556
Petitions for Hearings on Notification and Remedy of Defects, 49 CFR 557
Manufacturer Identification, 49 CFR 566
Certification, 49 CFR 567
Vehicles Manufactured in Two or More States, 49 CFR 568
Regrooved Tires, 49 CFR 569
Vehiche in Use Inspection Standards, 49 CFR 570
Subpart A—Vehicles with GVWR of 10,000 Pounds or Less:
Service Brake System, 570.5
Brake Power Unit, 570.6
Steering Systems, 570.7
Suspension System, 570.8
Tires, 570.9

Wheel Assemblies, 570.10
Subpart B—Vehicles with GVWR of More Than 10,000 Pounds:
Hydraulic Brake System, 570.55
Vacuum Brake Assist Unit and Vacuum Brake System, 570.56
Air Brake System and Air-Over-Hydraulic Brake System, 570.57
Electric Brake System, 570.58
Service Brake System, 570.59
Steering System, 570.60
Suspension System, 570.61
Tires, 570.62
Wheel Assemblies, 570.63

FEDERAL MOTOR VEHICLE SAFETY STANDARDS, 49 CFR 571

571.101-80 Standard No. 101; Controls and displays.
571.102 Standard No. 102; Transmission shift lever sequence, starter interlock, and transmission braking effect.
571.103 Standard No. 103; Windshield defrosting and defogging systems.
571.104 Standard No. 104; Windshield wiping and washing systems.
571.105 Standard No. 105; Hydraulic brake systems.
571.106 Standard No. 106; Brake hoses.
571.107 Standard No. 107; Reflecting surfaces.
571.108 Standard No. 108; Lamps, reflective defices and associated equipment.
571.109 Standard No. 109; New pneumatic tires.
571.110 Standard No. 110; Tire selection and rims.
571.111 Standard No. 111; Rearview mirrors.
571.112 Standard No. 112; Headlamp concealment devices.
571.113 Standard No. 113; Hood latch system.
571.114 Standard No. 114; Theft protection.
571.115 Standard No. 115; Vehicle identification number.
571.116 Standard No. 116; Motor vehicle brake fluids.
571.117 Standard No. 117; Retreaded pneumatic tires.
571.118 Standard No. 118; Power-operated window systems.
571.119 Standard No. 119; New pneumatic tires for vehicles other than passenger cars.
571.120 Standard No. 120; Tire selection and rims for motor vehicles other than passenger cars.
571.121 Standard No. 121; Air brake systems.
571.122 Standard No. 122; Motorcycle brake systems.
571.123 Standard No. 123; Motorcycle controls and displays.
571.124 Standard No. 124; Accelerator control systems.
571.125 Standard No. 125; Warning devices.
571.126 Standard No. 126; Truck-camper loading.
571.127 Standard No. 127; Speedometers and odometers (Effective Sept. 1, 1981.)
571.201 Standard No. 201; Occupant protection in interior impact.
571.202 Standard No. 202; Head restraints.
571.203 Standard No. 203; Impact protection for the driver from the steering control system.
571.204 Standard No. 204; Steering control rearward displacement.
571.205 Standard No. 205; Glazing materials.
571.206 Standard No. 206; Door locks and door retention components.
571.207 Standard No. 207; Seating systems.
571.208 Standard No. 208; Occupant crash protection.
571.209 Standard No. 209; Seat belt assemblies.
571.210 Standard No. 210; Seat belt assembly anchorages.
571.211 Standard No. 211; Wheel nuts, wheel disc, and hub caps.
571.212 Standard No. 212; Windshield mounting.
571.213 Standard No. 213; Child restraint systems.
571.214 Standard No. 214; Side door strength.
571.215 [Reserved].
571.216 Standard No. 216; Roof crush resistance-passenger cars.
571.217 Standard No. 217; Bus window retention and release.
571.218 Standard No. 218; Motorcycle helmets.
571.219 Standard No. 219; Windshield zone intrusion.
571.220 Standard No. 220; School bus rollover protection.
571.221 Standard No. 221; School bus body joint strength.
571.222 Standard No. 222; School bus passenger seating and crash protection.
571.301 Standard No. 301; Fuel system integrity.

571.302 Standard No. 302; Flammability of interior materials.
Anthropomorphic Test Dummies, 49 CFR 572
Defect and Non-Compliance Reports, 49 CFR 573
Tire Identification and Record Keeping, 49 CFR 574
Consumer Information Regulations, 49 CFR 574
Subpart B—Consumer Information Items:
Vehicle Stopping Distance, 575.101
Tire Reserve Load, 575.102
Uniform Tire Quality Grading Standards, 575.104
Record Retention, 49 CFR 576
Defect and Noncompliance Notification, 49 CFR 577
Defect and Noncompliance Responsibility, 49 CFR 579
Odometer Disclosure Requirements, 49 CFR 580 [1]
Bumper Standard, 49 CFR 581
Insurance Cost Information Regulation, 49 CFR 582 [1]

ENVIRONMENTAL PROTECTION AGENCY

Fuel Economy of Motor Vehicles, 40 CFR 600
Subpart A—Fuel Economy Regulations for 1977 and Later Model Year Automobile—General Provisions
Subpart B—Fuel Economy Regulations for 1978 and Later Model Year Automobiles—Test Procedures
Subpart C—Fuel Economy Regulations for 1977 and Later Model Year Automobiles—Procedures for Calculating Fuel Economy Values
Subpart D—Fuel Economy Regulations for 1977 and Later Model [2] Year Automobiles—Labeling
Subpart E—Fuel Economy Regulation for 1977 and Later Model Year Automobiles—Dealer Availability of Fuel Economy Information [1]
*ERR13*Subpart F—Fuel Economy Regulations for Model Year 1978 Passenger Automobiles and for 1979 and Later Model Year Automobiles (Light Trucks and Passenger Automobiles)—Procedures for Determining Manufacturer's Average Fuel Economy
Control of Air Pollution From Motor Vehicles and Motor Vehicle Engines, 40 CFR 85
Subpart E—Oxides of Nitrogen Research Program for the 1981 and Subsequent Model Years
Subpart P—Importation of Motor Vehicles and Motor Vehicle Engines
Subpart Q—Low-Emission Vehicles
Subpart R—Exclusion and Exemption of Motor Vehicles and Motor Vehicle Motor Vehicle Engines
Subpart S—Recall Regulations
Subpart T—Emission Defect Reporting Requirements
Subpart V—Emissions Control System Performance Warranty Regulations and Voluntary Aftermarket
Part Certification Program: Dealer Certification, 85.2108 [3]
Control of Air Pollution from New Motor Vehicles and New Motor Vehicle Engines: Certification and Test Procedures, 40 CFR 86 Subpart A—General Provisions for Emission Regulations for 1982 and Later Model Year New Heavy-Duty Engines
Subpart B—Emission Regulation for 1977 and Later Model Year New Light Duty Trucks; Test Procedures
Subpart D—Emission Regulations for New Gasoline Fueled and Diesel Heavy-Duty Engines; Gaseous Exhaust Test Procedures
Subpart G—Selective Enforcement Auditing of New Gasoline-Fueled and Diesel Light-Duty Vehicles and New Gasoline-Fueled and Diesel Light Duty Trucks
Subpart H—Emission Regulations for New 1977 and 1978 Model Year Gasoline Fueled Heavy-Duty Engines; Test Procedures
Subpart I—Emission Regulations for New Diesel Heavy Duty Engines; Smoke Exhaust Test Procedure
Subpart J—Emission Regulations for New 1977 and 1978 Model Year Diesel Heavy-Duty Engines; Gaseous Exhaust Test Procedure
Subpart K—Selective Enforcement Auditing of New Gasoline-Fueled and Diesel Heavy-Duty Engines and Light-Duty Trucks

[1] Applies to both dealers and manufacturers.
[2] Applies in part to both manufacturers and dealers and in part in manufacturers only.
[3] Applies to dealers.

Subpart N—Emission Regulations for New Gasoline-Fueled and Diesel Heavy-Duty Engines; Gaseous Exhaust Test Procedures
Subpart P—Emission Regulations for New Gasoline-Fueled Heavy-Duty Engines and Vehicles; Idle Test Procedures
Subpart Q—Regulation for Altitude Performance Adjustments and for New and In-Use Motor Vehicles and Engines

FEDERAL TRADE COMMISSION

Administrative Interpretations, General Policy Statements, and Enforcement Policy Statements; Assigning model years to motor vehicles, 16 CFR 14.11
Guides Concerning Advertising for New Automobiles, 16 CFR 259[4]

DEPARTMENT OF COMMERCE

Determination of Bona-Fide Motor-Vehicle Manufacturer, 15 CFR 615

UNITED STATES CUSTOMS SERVICE

Entry of Motor Vehicles and Motor Vehicle Engines Under the Clean Air Act, as Amended:
Federal motor vehicle air pollution control, 19 CFR 12.73
Federal motor vehicle safety standards, 19 CFR 12.80

Senator DANFORTH. When we consider the intrusiveness of Federal regulations, of course, there is one type of regulation which is extraordinarily detailed, such as how should steering columns be constructed, as an example, where the Federal Government details with precision exactly how something is to be done in the marketplace.

There is another type of regulation which is simply a disclosure type of regulation. It says that the Federal Government is not going to provide a detailed, specific rule about how something is going to be done. It is going to allow the market forces to work. But the market forces, operating effectively, would require knowledgeable consumers who can participate in that marketplace.

It has always been my theory that a simple informational type of regulation which allows the consumer to police the marketplace is much less heavy and much less intrusive than the more detailed, specific kind of regulation.

Have I missed the boat on that?

Ms. BAILEY. Not as far as I am concerned. I must say that that is our view, and the use of information disclosure has been a remedy that the Commission has turned to more and more often as the most effective and least intrusive way to deal with certain problems.

Senator DANFORTH. It would seem that the basic argument against this kind of simple form would be to say that we do not think that the buyers of used cars should know what they are buying. That would seem to me to be the essence of the argument. I do not think that the States' rights argument makes any sense at all.

It would seem to me that the basic argument against this simple informational disclosure would be to say that the buyer of a used car should be just left to his own devices. That we do not think that he should be informed. And that if a dealer knows of defects in a car and does not want to disclose them, that should be his privilege.

[4] Applies to both dealers and manufacturers.

It does not seem to me that that kind of argument is consistent with allowing free market forces to work in the most efficient possible way.

Ms. BAILEY. Certainly, I agree with that.

Senator GORTON. May I have three pages of the NIADA testimony to which my questions referred made a part of the record?

Senator KASTEN. Without objection, so ordered.

[The information referred to follows:]

EXCERPTS FROM NIADA COMMENTS SUBMITTED TO FTC, FEBRUARY 1979

XIII. CONCLUSION AND RECOMMENDATIONS

NIADA supports the overall goal of the Commission to improve consumer information and bargaining power in the used vehicle market. As members of a highly competitive industry, NIADA members are already experienced in responding to consumer demands.

Moreover, we approve of disclosure of significant known defects and clarification of the meaning of "as is" sales, to help buyers make informed decisions when purchasing used vehicles. Disclosure and clarification are two important tools already used by a significant number of dealers.

However, NIADA strongly opposes the rule proposed by the Commission staff. Not only is the drastic proposal of mandatory inspection unsupported by the record or by consumer demand, but the inflationary burden placed upon both consumers and the industry is unjustified.

The staff proposal distorts the Congressional mandate to study a disclosure rule for used car warranties into a requirement that dealers perform mandatory inspections. The proposed rule invades the states' traditional interest in vehicle safety and commercial practices without findings of the states' failure or inability to protect their own citizens.

The staff proposal uses Title II rulemaking authority to override the voluntary warranty scheme of Title I of the Magnuson-Moss Act. Title I is superseded without deference to the Act's recent enactment and without seeking first to examine its effectiveness or its potential as the appropriate remedy for any complaints found in the record.

The results of the proposed rule, if adopted, will be harsh, unnecessarily inflationary and counterproductive to the Commission's goals. An increasing number of used vehicles will be forced into the totally unregulated private market. Independent automobile dealers will shoulder a disproportionate share of the potential risks and repairs involved in the sale of a used product whose exact condition is impossible to determine. Dealers' increased costs from inspection, warranty liability and repairs will drive many small businesses from the market and adversely affect the highly competitive nature of the used car market. Independent dealers are least able to bear the increased costs of the staff proposal. They will feel its anti-competitive impact most directly.

Finally, the rule will certainly result in higher priced used cars for all consumers.

We surmise that the staff was influenced to an inordinate degree by a particular type of evidence in the record—consumer complaints. Although those complaints represent only a minute fraction of annual used car purchases, the staff appears to have exaggerated the problem and devised a remedy appropriate to that exaggeration without adequate consideration of its economic impact or the presence of evidence to support it.

Moreover, the absence of relevant economic data in the Staff Report heightens the failure to fashion a balanced proposal, not only between consumers and dealers, but between consumer choice and government-imposed regulation.

A. Recommendation for disclosure

Despite our objections to many of the provisions in the staff proposal, NIADA does not oppose a reasonable rule, providing for a disclosure sticker which does not entail mandatory inspection or a mandatory warranty. We believe a disclosure remedy would meet any need suggested by the rulemaking record and would be most consistent in integrating the goals of Title I and Title II of the Magnuson-Moss Act. Consumer protection would be enhanced by resolving any imbalance of consumer-dealer knowledge, yet the Commission would not be mandating warranties and undermining the competitive position of independent dealers.

It is always difficult and often impossible to determine the exact condition of a used product. Its parts are worn and may have been subjected to abusive treatment by previous owners. Neither buyer nor seller can ever be certain that some latent defect which evades discovery will not surface after resale. Disclosure of significant known defects, however, would assure that consumers, who would posses the same information as the dealer about the car's condition, could bargain for a reasonable price and warranty coverage to reflect the car's known mechanical condition.

NIADA believes that a beneficial balance in consumer and dealer knowledge can be achieved by means of a rule requiring a window sticker which would disclose both significant known defects and defects discovered during any state-required safety inspection. By "significant known defects", we mean all defects which the dealer is personally aware of other than cosmetic or minor defects.

The disclosure form would explain in clear and concise language the meaning of "as is" sales in terms of warranty coverage and allocation of repair costs. Further, the form would caution buyers against relying exclusively upon oral statements made by the seller. This information would give consumers more understanding of warranty terms which could be applied to a wide range of consumer products, thereby fulfilling a goal of the Magnuson-Moss Act that consumers be knowledgeable in bargaining for warranty protection.

NIADA believes that these disclosures would effectively eliminate substantially all the alleged consumer abuses found in the record. NIADA believes this proposal will meet the mandate of § 109(b) of the Magnuson-Moss Act. An example of this recommended disclosure form appears in Appendix B.

APPENDIX B

BEFORE YOU BUY A USED AUTOMOBILE, YOU SHOULD KNOW ABOUT . . .

One or more of the boxes below should be checked by the dealer.

Dealer discovered defects

☐ None (no defects other than those noted in any state—required inspection—ask for copy)

☐ The seller has discovered that this car has problems with the following items (not including minor or cosmetic items or items covered by separate state inspection requirements):

Defect	*Dealer Analysis of Problem*
_____	_____
_____	_____
_____	_____

☐ Dealer warranty

None (see This Is an "As Is" Sale)

Every dealer offers a different type of warranty. The seller of this car guarantees that for at least 30 days or 1,000 miles (whichever comes first), but not more than ——— days, the seller will pay ——— percent of the repair costs if you have problems with the following items:

_____
_____
_____

Ask us for a copy of this warranty before sale. No warranty applies if you subject the car to abuse or misuse.

☐ This Is an "As Is" Sale

"As Is" means that you lose any implied warranty rights you may have under state law. You pay all future repair costs.

IMPLIED WARRANTIES

State law gives you an "implied warranty" that your vehicle will be good enough for ordinary use. And, if you tell us to pick out a vehicle for some special use, you get another implied warranty that your vehicle will meet those special needs.

DO NOT RELY SOLELY ON ORAL STATEMENTS

You may not be able to enforce any promises which the seller makes to you unless they are in writing. Make sure you get all statements about the car's condition, repairs and warranty coverage in writing.

87-804 O - 82 - 3

PAST USE(S) OF THE VEHICLE

The seller has determined to the best of his ability that the past use(s) of this car was as follows:

- ☐ Private owner
- ☐ Private lessee
- ☐ Commercial owner
- ☐ Commercial lessee
- ☐ Taxi
- ☐ Other———————
- ☐ Daily/weekly rental
- ☐ Driver education
- ☐ Dealer demonstrator
- ☐ Police
- ☐ Unknown

MILEAGE

Federal law requires the seller to give you a form disclosing the actual mileage or stating the mileage is unknown for this vehicle. Ask for it.

DEALER

Name———————————————
Address———————————————
See for complaints———————————————

VEHICLE

Make———————————————
Model———————————————
Model year———————————————
Vehicle ID number———————————————

The information on this form is part of any contract to buy this vehicle.

Senator KASTEN. Senator Ford.

Senator FORD. Thank you, Mr. Chairman.

Ms. Bailey, you have done very well this morning articulating your position, and I congratulate you on that. You probably had at least one convert here this morning, publicly expressed.

Ms. BAILEY. I am very grateful for that, too.

Senator FORD. You don't have to inspect or disclose.

Ms. BAILEY. You do have to disclose, but not inspect.

Senator FORD. That day will come shortly.

One of the political observations that was made in 1980 is that Government is interfering with your life too much. You want to get them off your back and out of your pocket.

Commissioner Miller made a statement—I'm sure I cannot quote it accurately, but I think the sum and substance of it is that he agreed to a reduction of some $10.8 million in the budget for FTC. I do not think the Appropriations Committee the 12 percent cut.

In making that statement, in reducing FTC's budget, he said that FTC should get back to basics. Do you know what he meant?

Ms. BAILEY. No, sir. We have not had a complete discussion of precisely what he meant. But if that is a statement of overall philosophy, then I don't disagree with it. I think this rule is very basic, Senator Ford.

Senator FORD. What I am saying is I have gone through this. I still have some marks across my back from the last time we brought FTC budget out.

Ms. BAILEY. So do I.

Senator FORD. Maybe yours are from a different arena than mine. You said you did not know a person, if I understood you correctly a moment ago, who was purchasing a car, new or used, that was not alert.

Ms. BAILEY. That would be an assumption on my part. As an assumption, yes.

Senator FORD. You said you did not know a person who was purchasing a car, new or used, that wasn't alert.

Ms. BAILEY. Or trying to be.

Senator FORD. That tells you that the general public is alert, maybe without the sticker.

Ms. BAILEY. Oh, I see what you're saying. I don't disagree with that at all. Certainly.

The fact is I don't want to characterize the industry or the problems that it has had. That is not fair. I was responding, as you know, to Senator Kasten's suggestion that the sticker was negative in tone.

A car has somewhere in the neighborhood of, as I recall, 15,000 parts. There are very few people who are going to know one end of the car very well from the other. That is what I meant by being alert. You have to be to try to do the best you can.

Senator FORD. How many families in this country own an automobile?

Ms. BAILEY. I don't know.

Senator FORD. Would you say overwhelming percentage?

Ms. BAILEY. Yes, I would.

Senator FORD. In your decisionmaking, I understand that the investigation leading to this rule began in 1973; is that correct?

Ms. BAILEY. That's my understanding, yes.

Senator FORD. Is it true that many studies and other information supporting the rule date back to the early- and midseventies? And if they do, do you not believe that some of this information may have been outdated?

Ms. BAILEY. I understand what you are saying. We have had comments on the rule all the way up until the end of 1979 or the middle of 1980. We even had additional comments in 1980.

The record, even though closed technically at a certain time, includes postrecord comments filed almost up until the last year.

There are many circumstances, Senator Ford, in which that would be a very valid worry, that stale information may form the basis for some decision at a later time. I do not believe that in this case the nature of the transaction that we are talking about has changed except to the extent that there is a dramatic growth in the sale of used cars because of the economic—current economic conditions. Otherwise, the information in the record I don't believe could be characterized as stale in terms of the regulation.

Senator FORD. Nine years is a long time.

Ms. BAILEY. It certainly is.

Senator FORD. You say there is no inspection requirement?

Ms. BAILEY. That's correct.

Senator FORD. Let me read you a part of section 455.6 of the rule dealing with the brake system. And I am quoting from page 41,366 of the Federal Register, Volume 6, No. 157, Friday, August 14, 1981, Rules and Regulations. And it says: (2) Brake System. "Pedal not firm under pressure. Procedure, with engine running of vehicle's equipment power brake system and the ignition turned to on. Other vehicles supply force of 125 pounds to the brake pedal and

hold for 10 seconds. Make sure that there is no decrease in pedal height and that the failure lamp does not light."

Now, this is required inspection or what?

Ms. BAILEY. No, sir. The purpose of listing those test protocols is to—if dealers feel that they do not know what is meant by the standard that is on the back, it is to give them guidance so they know, because we have to use some kinds of standards. We used the test protocols developed by the Department of Transportation so that they will know when a problem with the brakes is important enough to disclose. If they do not think it is or if they are not sure, we have just given an idea of what it means.

Senator FORD. If a dealer is forced to inspect or he thinks he must inspect, then he has to follow the criteria that you set out in your language.

Ms. BAILEY. No. In the first place, he does not have to inspect and should not feel that he is forced to. Even so, if he does inspect, this is only an example of the kind of procedures that could be used.

Actually, it says, up a little bit earlier, that other test procedures that when properly applied produce the same or substantially similar results are all right. That is up a bit from the example that you just read, at the bottom of the first paragraph on page 41366, it says specifically that other test procedures can be used.

Senator FORD. And then treat all vehicles the same, with 125 pounds pressure for 10 seconds with the ignition on, and so forth, regardless.

Ms. BAILEY. Regardless.

Senator FORD. Has the Commission brought any recent actions under section 5 against used car dealers for failure to disclose known defects?

Ms. BAILEY. No.

Senator FORD. Well, then my concern is that the Commission has listed all of these parts and insists on the subject of disclosure. But there really is not any concrete record which gives meaning to the term "defect" and separates it from the nominal wear and tear.

Ms. BAILEY. The best way I can answer that is to say the list that is on the back we chose is a pared down list that is used in the State of Wisconsin, and that list of defects was developed for the Wisconsin State legislature by a committee which included, among others, used car dealers who helped to lay it out. And the record shows, in Wisconsin, that there is substantial compliance and that used car dealers do not seem to have difficulty understanding what these terms mean or how to apply them.

Senator FORD. Did you have a differential between a frost belt and sun belt, as it relates to the use of an automobile?

Ms. BAILEY. No. There is nothing in the rule about the use of the automobile.

Senator FORD. If you're taking Wisconsin, that's in the frost belt, and Florida is in the Sun belt.

Ms. BAILEY. If the brakes don't work, it wouldn't matter.

Senator FORD. I understand that. But certain components—such as the cooling system—would rust in the South from the salt water from the ocean. Wisconsin's experience would not necessarily apply

to different geographic areas, and you're trying to make the other 49 States do the same.

I am of the opinion that it is difficult to develop a sticker system that will comply to all 50 States. You are painting with a broad brush, as we normally do here in Washington. And we don't use a little commonsense as it relates to the various parts of the country, various States, different industries.

And it concerns me considerably that you have written an ambiguous rule but stated inspection isn't required. But once they have some kind of knowledge of a problem, then I think that they will need to inspect whether they want it or not. They are going to have to inpect it, because in order to protect themselves, they have to. And they will stick the price onto the car based on the additional cost of inspecting.

Now, the consumer here we're trying protect and the little old lady in tennis shoes that Senator Long was talking about a while ago, I think she ought to be protected. But surely to goodness, she wouldn't go down to any hack downtown and try to buy a used car. She would go to a substantial dealer.

Now, you're talking about major used car franchised dealers that are covered by the rule. They sell probably most of the used cars I would say because they get more used cars, they get more of the trade. And their reputation is on the line, in my opinion.

That little lady that wants to buy a used car and does not have sufficient furds to buy a new car or just wants it for a weekend to drive to the grocery store or something, probably that is where she would buy her car, from a reputable dealer.

I believe you may be putting—you may be painting with a broad brush, as we do here most of the time. There is a bad apple or two, and you have made the whole barrel bad.

Ms. BAILEY. I understand what you're saying. I do not think we have a situation where there are just a couple of apples that are bad. It seems clear to us that this kind of rule, which is very simple, it requires only disclosure of information. If anything, it will only benefit honest competitors in this market, of which there are many.

Someone mentioned earlier part of the problem that develops is not just injury to consumers but injury to competitors who are trying to comply with the law and to be open about their sales.

I would say, too, about trying to paint with a broad brush, I understand what you are saying, and that has been a tendency in the recent past in Washington. But the defect list on the back of the sticker, where it includes the Department of Transportation standards, I just want to mention those standards developed by the Department of Transportation have been adopted as the standards for inspection in 29 States. So there is at least some across-the-board applicability of some of these things, although I understand——

Senator FORD. Were those developed under Mrs. Claybrook?

Ms. BAILEY. No. That's the National Highway Safety—Traffic Safety Administration, which has much more burdensome regulations than certainly we do.

Senator FORD. That's DOT.

Ms. BAILEY. In the early seventies. It is a separate agency within the jurisdiction—I'm talking about just the Department itself. It did not come out of that agency, Senator Ford.

Senator FORD. I understand my time is up. And it has been a delight to talk to you.

Ms. BAILEY. Thank you.

Senator FORD. I still go back to the point, if I may, that you have no documented evidence at FTC where you brought, under section 5, against any used car dealer, for known defects.

I wonder who the witnesses were and what they were presenting, and if it was the Governor's appointee who came to FTC? Was it the Attorney General's appointee that came to FTC? Was it the Highway Commissioner's appointee that came and sat down with you? From what part of the State and what jurisdiction?

Ms. BAILEY. We would be glad to present a list of those people to you, Senator Ford. Some of them—in large part, they were representatives of attorneys general's offices who handled consumer protection and antitrust matters for the State. We will make a list of those for you so that you have them.

[The following information was subsequently received for the record:]

STATE AND LOCAL OFFICIALS COMMENTING ON FTC USED CAR RULE—COMMENTS ON OPTIONAL INSPECTION VERSION OF RULE

	For or against	Reasons for opposing	Need for rule
Alabama			
Alaska			
Arizona:			
Assistant attorney general, financial fraud division, John C. Dutton, Jr.	For	N/A	Rule should also require dealer to state whether inspection performed and whether repair facilities available, in addition to disclosing why system "not okay," if so designated.
Howard L. Marshall, human services coordinator, human services division, city of Phoenix.	For	N/A	Optional inspection rule adequate.
Judith Schuler, director, consumer education, Tucson Skill Center, Pima County community college district.	For	N/A	"Don't know" option should be eliminated because of potential deception of consumers by dealers.
Arkansas			
California:			
Senior assistant attorney general, Herschel T. Elkins, Department of Justice, Los Angeles.	For	N/A	Agrees that disclosures would alert the consumer to possible defects and reduce incidence of oral misrepresentations in most cases.
District attorney Arlo Smith, San Francisco.	For	N/A	Agrees that disclosures should be required.
Robert N. Wiens, chief, bureau of automotive repair, department of consumer affairs.	For	N/A	Should add governmental agency address for complaints to Buyers Guide; also require results of compression test and Blue Book value on Guide.
Richard B. Spohn, director, Department of Consumer Affairs.	For	N/A	Would advocate a presale inspection requirement; but Buyers Guide disclosures would decrease incidence of oral representations by dealers.

STATE AND LOCAL OFFICIALS COMMENTING ON FTC USED CAR RULE—COMMENTS ON OPTIONAL INSPECTION VERSION OF RULE—Continued

	For or against	Reasons for opposing	Need for rule
Lawrence R. Sheahan, consumer services division, County of Santa Clara.	For	N/A	Buyers Guide which does not contain mechanical condition checklist will not be effective.
Shirley Goldinger, director of consumer affairs, County of Los Angeles.	For	N/A	Would favor a stronger rule because unscrupulous dealers could engage in deception when "Don't know" box checked.
Kathie Klass, consumer coordinator, County of Santa Cruz.	For	N/A	Would like to see stronger rule.
Ronald Melendez, director, office of consumer affairs, Orange County.	For	N/A	Dealer should also be required to inspect the 14 vehicle systems and disclose repairs already made to the car.
Amy Weitz, consumer action, San Francisco.	For	N/A	Mandatory inspection is necessary to protect the consumer.
Stepen Lenzi, Automobile Club of Southern California.	For	N/A	Would oppose mandatory inspection because it would be too costly and the cost would ultimately be passed on to the consumer.
Colorado: Stephen P. Hopkins, information specialist, motor vehicle dealer, licensing board, State of Colorado.	For	N/A	Would prefer a more simple, more cautionary tone in Buyers Guide.
Connecticut: Ella Grasso, Governor	For	N/A	Would eliminate "Don't Know" from Buyers Guide so that dealer would have to choose between "OK" or "Not OK."
Delaware			
Florida: Broward County Board of County Commissioners, Consumer Affairs Division, Stanley A. Kaufman, Director.	Against	(1)	
Georgia: Tim Ryles, administrator, Georgia Office of Consumer Affairs.	For	N/A	Would prefer a mandatory inspection, but believes disclosures required by proposed rule are helpful to consumer decisions and likely to reduce oral misrepresentations.
Illinois: Susan Pierson De Witt, assistant attorney general, chief, Consumer Protection Division.	For	N/A	Would prefer mandatory inspection.
Indiana: Gary Consumer Affairs, Weights and Measures, Brian Nelson, director.	For	N/A	Would eliminate "Don't Know" on Buyers Guide to give buyer better idea of problems in the car systems.
Iowa			
Kansas: Wayne E. Hundley, deputy attorney general, office of the State attorney general.	For	N/A	Concurs with position taken by Massachusetts A.G.'s office.
Kentucky			
Louisiana: Consumer Protection Center, Lacey Raymond, administrative assistant.	For	N/A	Disclosure requirements must be enforced vigorously by FTC; burden also rests on car buyer to use care in inspecting car before buying.
Maine: Rae Ann French, assistant attorney general, Consumer and Antitrust Division, Richard Cohen, attorney general.	For	N/A	Maine disclosure law and FTC rule, if used together, could cause confusion; Buyers Guide should be changed to reflect potentially greater rights under State law.
Maryland: Jonathan Acton II, assistant attorney general, consumer protection division.	For	N/A	Buyers Guide should be changed to reflect Maryland's implied warranties for used cars; such statement should be on the Guide.
Massachusetts: Susan Grant, office of the district attorney Hampshire County.	For	N/A	Greater attention should be called to consumers' rights under State implied warranties laws, where applicable, as in Massachusetts.

STATE AND LOCAL OFFICIALS COMMENTING ON FTC USED CAR RULE—COMMENTS ON OPTIONAL INSPECTION VERSION OF RULE—Continued

	For or against	Reasons for opposing	Need for rule
John Donohue, assistant attorney general, consumer protection division.	For	N/A	Buyers Guide should be modified to reflect variations in protections offered by various states, e.g., Massachusetts and Maine.
Michigan:			
Esther K. Shapiro, director, Detroit Consumer Affairs Division.	For	N/A	"Don't Know" category should be eliminated because it does not inform or forewarn the consumer of possible auto defects.
Linda Joy, executive director, Michigan Consumers Council.	For	N/A	Disclosures in Buyers Guide should provide a reduction in unfair and deceptive sales practices.
Minnesota: Office of Consumer Services, Paula M. Stenlund, investigator.	For	N/A	Buyers Guide is step in the right direction, but without mandatory inspection, dealers have much opportunity for deception.
Missouri: William Newcomb, Jr., chief counsel and Cary Augustine, assistant attorney general, consumer protection division.	For	N/A	Misrepresentations will be reduced, and Buyers Guide provides useful, albeit perhaps not complete, information. However, consumers may still be deceived by oral representations.
Montana			
Nebraska			
Nevada			
New Hampshire			
New Jersey:			
County of Union New Jersey, Department of Human Resources, Division of Consumer Affairs, Ellen Bloom, director.	For	N/A	Stronger rule needed, oral misrepresentations still highly possible; it should be made clear that oral statements do not bind the seller.
Board of Chosen Freeholders, County of Monmouth, Department of Consumer Affairs, Joan W. Litwin, Director.	For	N/A	"Don't Know" category on Buyers Guide is a large loophole for dealers; the choice should be between "OK" and "Not OK" despite added costs.
County of Ocean, Department of Consumer Affairs, Elizabeth S. Rozier, director.	For	N/A	"Don't Know" category defeats purpose of Rule; full disclosure would be preferable.
Doris Waltz, Office of Consumer Affairs, Burlington County.	Against	(2)	
New Mexico			
New York:			
State of New York, Executive Department, State Consumer Protection Board, Michael Meyerson, attorney.	For	N/A	Buyers Guide should allow for statement regarding greater consumer rights under State law.
Oneida County, Division of Consumer Affairs, Anthony Sardelli, RA.	For	N/A	Buyers Guide categories (OK, etc.) not clearly defined and should be.
Consumer Affairs, city of Syracuse, Jeanne L. Schuitheis.	For	N/A	When dealer checks "Don't Know" box, consumer should be explicitly alerted to possible meanings of that designation (e.g., that something may be wrong with that system).
County of Suffolk, Department of Consumer Affairs, Suffolk County Center, David M. Haar, consumer affairs educator.	For	N/A	Car sold with a "reliable" warranty period should not have to be sold with the checklist; "as is" sales should require Buyers Guide checklist.
Department of Consumer Affairs, city of New York, Helen K. Rosenberg, general counsel.	For	N/A	Mandatory pre-sale inspection would be best solution.
Al Smoke, executive director New York Consumer Assembly.	For	N/A	Mandatory warranty period, even if short, should be required by Rule.
North Carolina: John Matthis, Special Deputy Attorney General, Department of Justice.	For	N/A	Consumer's position overall is improved by even optional inspection.
North Dakota			

STATE AND LOCAL OFFICIALS COMMENTING ON FTC USED CAR RULE—COMMENTS ON OPTIONAL INSPECTION VERSION OF RULE—Continued

	For or against	Reasons for opposing	Need for rule
Ohio: City of Cincinnati, Office of City Solicitor, Consumer Protection Division, Noel M. Morgan, chief.	For	N/A	Mandatory inspection should be required and federal enforcement is necessary.
Oklahoma			
Oregon: Oregon Consumer League, Ralph A. Smith, President.	For	N/A	Mechanical condition checklist and warranty disclosure are adequate to protect the public.
Pennsylvania			
South Carolina:			
State of South Carolina, Department of Consumer Affairs, Stephen A. Graham, executive assistant.	For	N/A	Disclosures will benefit the consumer, to the extent they know what to expect if "Don't Know" or "Not OK" boxes checked.
Irvin Parker, administrator, State of South Carolina, Department of Consumer Affairs.	Against	(3)	N/A
South Dakota			
Tennessee			
Texas:			
City of San Antonio, Department of Human Resources and Services, Community Action Division, Richard J. Brown, program manager.	For	N/A	Dealers should be required to give a guarantee on some systems, and the "Don't Know" box should be eliminated from the Buyers Guide.
Cameron and Willacy Counties community projects, Alejandro Coronado, deputy director.	For	N/A	"Don't Know" box can be used to deceive customers.
Community Services, Inc., Jerome Vacek, executive director.	For	N/A	Disclosures are adequate.
Utah:			
Attorney general, Jeffrey Oritt, Consumer Affairs Division.	For	N/A	Disclosures are adequate.
State of Utah, Department of Business Regulation Trade Commission, Consumer Affairs Division, Eueda C. McCoy, executive secretary.	For	N/A	"Don't Know" category could create problems for some consumers, but overall, they will ask more meaningful questions with the presence of the Buyers Guide.
Virginia:			
County of Prince William, Peter Dry Malski, director.	For	N/A	"OK" rating should give a "30-day, 50/50" warranty; "Don't Know" category will at least alert consumer to be cautious.
County of Fairfax, Department of Consumer Affairs, Ronald B. Mallard, director.	Against	(4)	N/A
Washington: Seattle Department of Licenses and Consumer Affairs, Regina L. Glenn, director.	For	N/A	Warranty definition should be expanded, as in U.C.C. definition.
Wisconsin: Department of Justice, William C. Wolford, assistant attorney general.	For	N/A	"Don't Know" should be eliminated from Buyers Guide.
District of Columbia: Frederick Goldberg, general counsel, Victor Simon, attorney, Office of Consumer Affairs.	For	N/A	Systems marked "OK" should be warranted for at east 30 days, with repair cost to dealer; there is a need to abolish "as is" sales. Any Buyers Guide which is not filled in should be a violation of the Rule, and so stated on the Guide.

[1] Believes proposed rule does not eliminate potential for deception or gives consumer adequate rights; believes that there should be specific warranty for items marked "OK" on Buyers Guide.
[2] Rule seems to be unenforceable.
[3] Rule would not benefit consumer and would cost more than it is worth; mandatory inspection is the only effective means of helping consumers.
[4] Buyers Guide (with "Don't Know" box) will not help consumer and will give opportunity for dealer to deceive. "OK" rating should involve specific liabilities on dealer. "As Is" definition not presented in clear way.

COMMENTS ON MANDATORY INSPECTION VERSION OF RULE

Alaska Attorney General
California Department of Consumer Affairs
Orange County, California, Office of Consumer Affairs
Marion County, California, District Attorney
Santa Cruz, California, District Attorney
Colorado Dealer Licensing Board
Denver, Colorado, District Attorney
Boulder, Colorado, District Attorney
District of Columbia, Office of Consumer Protection
Florida, Attorney General
Palm Beach, Florida, Department of Consumer Affairs
Gary, Indiana, Office of Consumer Affairs
Witchita, Kansas, District Attorney
Baton Rouge, Louisiana, Consumer Protection Office
Massachusetts, Attorney General
Boston, Massachusetts, Consumer Council
Maine, Attorney General
Ellicott City, Maryland, Office of Consumer Affairs
Minnesota, Office of Consumer Affairs
Missoula, Montana, City Attorney
New Jersey, Department of Consumer Affairs
Newark, New Jersey, Office of Consumer Affairs
Paterson, New Jersey, Office of Consumer Affairs
New York State, Consumer Protection Board
New York City, Department of Consumer Affairs
Kingston, New York, District Attorney
Buffalo, New York, Consumer Protection Office
Syracuse, New York, Office of Consumer Affairs
North Carolina, Department of Motor Vehicles
Ohio, Attorney General
Cincinnati, Ohio, Consumer Protection Office
Oregon, Attorney General
Oregon, Department of Motor Vehicles
Coos County, Oregon, District Attorney
South Dakota, Attorney General
South Dakota, Department of Motor Vehicles
Utah, Department of Motor Vehicles
Utah, Department of Business Regulations, Consumer Division
Vermont, Attorney General
Alexandria, Virginia, Office of Consumer Affairs
Fairfax, Virginia, Office of Consumer Affairs
Washington, Department of Motor Vehicles
Washington State Police
Wisconsin Department of Motor Vehicles
Wyoming Department of Revenue

Senator KASTEN. The Wisconsin law does not have this particular problem, the "known defects" problem. We require inspection and require that the dealers repair defective safety equipment and disclose the cause of other defects. The Wisconsin law is stricter, but at least I think it is more predictable. We do not know what a known defect is going to be, and we don't know how the FTC is going to decide what it is. And you have got a $10,000 civil penalty per violation. Does that mean $10,000 per car? $20,000 per car? Is it limited in any way?

Senator FORD. 1,600 times 10?

Senator KASTEN. Or do you wait until there are 15 violations and say, "We are warning you right now the 16th violation is going to be a $10,000 violation"? It is the "iffy" question of how the Federal Trade Commission will enforce this rule that cannot be counted on. In Wisconsin, we can count on it.

Ms. BAILEY. I understand there is more certainty in the Wisconsin law, but I certainly would not like to be here today advocating a mandatory inspection law that required dealers to repair safety defects discovered in the course of that inspection.

Senater KASTEN. I understand that, but what you have is not acceptable either.

Ms. BAILEY. I understand that many people feel that way.

The answer about the FTC's enforcment and whether it is predictable or not is that we have other rules that have been promulgated in the past on which we have clear records of the way in which we enforce matters. In almost every case—in many, many cases, we cover many, many small businesses. The mail order rule is one of those, a number of rules where the enforcement pattern shows that the Commission does not have the resources in the first place, even if it were desirable, to go all over the country trying to see if a used car dealer has put down the wrong defect for some problem with a car.

What we are trying to do is to bring some greater amount of candor and information into this transaction. And to the degree that a pattern of abuse shows up with continued oral misrepresentations and misrepresentation of the condition of the car, then we will become interested.

The history of our enforcement of other rules I believe shows that to be the way we act.

Senator KASTEN. There are people in the small business community who think that your enforcement is petty and discriminatory. I would hate to be the first car dealer that you and the staff decide to sue in order to send a message to the industry.

That is the problem. It is a tremendous problem. I cannot believe that you can sit there saying that that is not a problem. You cannot enforce the rule against everyone in the industry, so you will have to make an example of a few dealers.

Ms. BAILEY. That is right. But it wouldn't be just an example.

Senator DANFORTH. What is the problem? I don't see that that is a problem. Why is that a problem?

Senator KASTEN. Let me ask her.

Ms. BAILEY. What I meant was, he is worried about a used car dealer being singled out and suddenly being hit. And what I was getting ready to explain is that that is not the way it works anyway. If a pattern of abuse starts to show up, because we are hearing it from complaints, it may be coming from the local law enforcement people or from our mail at the Commission. We begin by just going and asking questions and trying to find out whether there is any truth to what we have been hearing. It is a long procedure, Senator, and it winds up in the Federal courts under the jurisdiction of the Department of Justice.

Senator KASTEN. Senator Pressler.

Senator PRESSLER. One thing that has not been covered here is the 50-percent of sales by nondealers—private owners—who sell used cars. What about that group? I understand that over 50 percent of the used cars that are sold are sold in private arrangements. Why aren't they covered by this rule?

Ms. BAILEY. The answer—there are several answers to that. The first is that the Commission does not regulate transactions between private individuals or seek to.

The second answer is that on the basis of complaints that were received, we get very few complaints, certainly by comparison, about sales of cars between private individuals, and the record in this proceeding simply would not support extending the rule to private sales, even if that were considered desirable, which we do not consider it. The record would not support covering private sales.

Senator PRESSLER. Certainly we are talking about protecting consumers. The same logic could be applied. Why wouldn't there be some of these forms available down at the Post Office for 10 cents for anybody who wanted to sell a car privately. Wouldn't your logic certainly apply? It may be, as occurs sometimes in my listening meetings in my State, that people who have the most complaints aren't there. Surely, the same logic would apply to private sales. Wouldn't your logic apply? We would have it carried over to other things, air-conditioners, real estate, dairy cattle. Why don't we require it for all sales of used equipment? Let there be a Federal certificate. That's the question I have. Why does your logic stop just at the dealers?

Ms. BAILEY. It is the history of the Commission that we deal with groups, industries that hold themselves out to be in the business. We do not try to get into the business of regulating behavior between private individuals. I suppose that we make that call. In any event, the law sometimes makes that call.

Let me give you another example that comes readily to mind, if I could. Under the Fair Debt Collection Practices Act, which is a totally separate question, but the same issue sometimes is raised, and I will raise it for you, the Commission deals with enforcing that law at the direction of Congress. And many debt collection companies are small companies. And the law is very specific. They cannot call people in the middle of the night and harass them. They cannot call them on the job and threaten them. They cannot say that they're going to take them to court, if they do not have the authority to take legal action.

But—so we enforce that law—but if you were to loan some money to Senator Danforth, and he just fiddled around and didn't pay you back——

Senator FORD. If we're going to start loaning money, I'm going to come back.

Ms. BAILEY. The Federal Trade Commission would not get into it—if you want to call him in the middle of the night and harass him or call his friends——

Senator PRESSLER. Let's do this with farm machinery. Why don't we apply the same standard? Why don't we have somebody who sells a tractor fill one of these out?

Ms. BAILEY. If the Congress wishes the Commission to engage in an rulemaking proceeding with respect to used farm equipment, we will certainly consider it.

Senator PRESSLER. We do not wish that, but my point is, where does your logic stop, and why does your logic stop at just a used car dealer? Why not a used machinery dealer?

Ms. BAILEY. The statutory instruction dealt specifically with used car dealers, and that is what the record entirely concerns.

Senator PRESSLER. Would your logic apply this to all sales, to the sales of horses? Indeed, when you buy a horse, or if you buy a used farm machine or used furniture, or used air-conditioner, why don't we then require that there be a Federal form for all of these things?

Senator FORD. I object to anything on used horses.

Senator PRESSLER. Shouldn't there be a Federal regulatory form filed with every horse that is sold?

Senator FORD. You're gone to meddling now, Senator.

Senator PRESSLER. What about used farm machinery?

Ms. BAILEY. Senator Pressler, I don't know how to answer that question. If there is a problem in the sale of used farm machinery, it has not been brought to the attention of the Federal Trade Commission.

Senator DANFORTH. Send them a letter.

Senator PRESSLER. I don't advocate that. But my point is that what we're talking about here is Federal regulation. Most candidates for President, most candidates for the Senate have based their campaigns on less Federal regulation—50 percent of the car sales are not even covered. Why don't we extend the rule to cover private sales, and make the forms available at every post office? Why don't we require it for the used air-conditioners? Or real estate? Farm machinery? Anything?

That's my point. Where do we stop here? And why are we stopping just with used car dealers?

Senator GORTON. There are probably more complaints about them.

Senator PRESSLER. I don't know if that is true.

Ms. BAILEY. It is true. At the Federal Trade Commission the No. 1 leading source of complaints for many years has been car sales, new and used.

Senator PRESSLER. Well, I'm sure that the same thing exists in private sales. I am sure that there is a problem in buying a used car, and so forth. But I just think this will not solve the problem.

Indeed, you could carry it a step further, and a dealer could say that he did not know. And then you would have litigation over what a reasonable man would know and a reasonable man would not know. We say that this thing will not cost anything, but it will cost millions of dollars in litigation and compliance costs and so forth. If you assume that the dealer is dishonest, then he could very easily say: "I did not know about that defect." Then you have a litigation situation. So it is going to cost millions of dollars, and it is another example of Federal aggravation that I think that we should not be getting into at this point. In any event, if we are going to get into it, I am glad that the Congress is going to have a chance to vote on it under this two-House veto.

Thank you, Mr. Chairman.

Senator KASTEN. Thank you, Senator Pressler. And thank you very much, Commissioner Bailey.

We are on all different sides of this issue, but I think that everyone would agree that this has been an enlightening and a

very helpful discussion of this rule, and we greatly appreciate your testimony and your participation this morning.

Ms. BAILEY. Thank you.

[The statement follows:]

STATEMENT OF PATRICIA P. BAILEY, COMMISSIONER, FEDERAL TRADE COMMISSION

Mr. Chairman and members of the Committee, thank you for the opportunity to appear today for the Federal Trade Commission [1] to discuss the trade regulation rule promulgated by the Commission concerning the sale of used motor vehicles. Accompanying me this morning are Katherine Mazzaferri, Assistant Director for the Division of Product Reliability, who supervises the staff work on the rule, and Susan Liss, who is the lead attorney on the rulemaking staff. Following my testimony, Ms. Mazzaferri, Ms. Liss and I will be available to answer any questions you may have during the course of the hearing.

The used car proceeding was undertaken five years ago following the enactment of the Magnuson-Moss Warranty Act which directed the FTC to initiate a rulemaking proceeding with respect to the sales of used cars "within one year" of the Act's passage and, if indicated by the proceeding, to prescribe a rule dealing with used car warranties and warranty practices.[2] That law further stated that in issuing such a rule, the Commission could "exercise any authority it may have under this title [of the Magnuson-Moss Act] or other law".[3] Section 111 of that Act specifically provides that the Act was not intended to "repeal, invalidate or supersede the Federal Trade Commission Act . . .".[4] The Commission thus concluded, we believe correctly, that any Used Car Rule could be promulgated under both the Magnuson-Moss Warranty Act and the FTC Act or any other law that Congress had directed the Commission to enforce. As a direct result of that statutory instruction, the Commission published an Initial Notice of Proposed Rulemaking on January 6, 1976.

During the course of the years that followed, the Commission considered several remedial approaches to a pattern of deceptive practices it found to exist in the used car industry. The Commission first considered and then rejected a rule which would have mandated inspection of all used cars and would have required disclosure of the results to consumers. It later considered a rule that would have in effect made such inspections optional, but would have forced dealers to disclose whether they had occurred or not and, if they had occurred, to disclose the results. In the end, the Commission rejected both the mandatory and optional inspection approaches and instead promulgated a rule which focuses essentially on warranty information and other disclosures. The rule promulgated on August 18, 1981, requires disclosure of what warranty coverage, if any, is offered for a used car. In addition, if the dealer knows about certain specified defects in a used car's major mechanical systems, the dealers must disclose that information. The rule explicitly provides that the dealer does *not* have to inspect used cars offered for sale to discover defects or for any other reason.

The requirements of the rule promulgated by the Commission are contained entirely in the sample window sticker which is attached to my testimony. The rule quite simply requires that dealers complete the sticker with information already in their possession and post the stickers in the window of each used car offered for sale. The sticker discloses:

That spoken promises are difficult to enforce;

That pre-purchase inspections by an independent third party may be permitted;

Either that the car is being sold "as is", or the extent of any warranty coverage for the car's major systems.

Any specific major defects in the car of which the dealer is aware.

The back of the sticker lists the totality of the major defects that dealers must disclose if they know about them. The window sticker was designed to be and, in all we believe it is, an uncomplicated and straightforward document.

The Commission's final decision to promulgate the rule described above was based on a rulemaking record compiled during a four and a half year proceeding. I will devote the balance of my time before you today to a review of how we went about obtaining that record and what it contains. Finally, I will summarize briefly some of the major objections to the rule which we understand to exist and the Commission's response to each.

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[1] Chairman Miller not participating.
[2] 15 U.S.C. § 2309(b).
[3] 15 U.S.C. § 2309(b).
[4] 15 U.S.C. § 2311(a)(1).

The information contained in the rulemaking notice published by the Commission in January 1976 was derived from a report prepared for the Commission by its staff which described warranty practices and a variety of other practices which, in the staff's opinion, violated Section 5 of the FTC Act. These alleged practices included widespread misrepresentations of a car's mechanical condition at the time of sale and consistent failures to disclose either the absence of any warranty coverage or limitations upon such coverage.

The initial rulemaking notice proposed a trade regulation rule to remedy these allegedly unlawful practices through a window sticker posted on each car disclosing warranty terms, warranty disclaimers, prior use of the vehicle, mileage, prior repairs, and dealer identification information, as well as a specified form of warranty disclaimer to be used in an "as is" sale. The rulemaking notice sought public comment about the suggested window sticker and additional remedies, including the disclosure of mechanical defect information and a "pre-purchase inspection opportunity" which would have given consumers the right to take a car to a third party for inspection prior to purchase. This January 1976 request for comment was the first of several efforts to seek public input about defect disclosure.

Comments were received from all interested segments of the public who might be affected by a rule. Used car dealers, dealer trade associations, individual consumers, consumer groups, state and local law enforcement officials, members of Congress, legal aid attorneys, auto rental and leasing associations, and federal agencies all submitted their views. A total of 1,681 comments were received through October 1976. Then hearings were held in six cities across the country from December 1976 to May 1977. Two hundred and twelve people testified, and were subject to questioning by the Commission staff and by designated representatives of used car dealers, auto rental and leasing industries, and consumer groups. Both the Presiding Officer and the Commission staff then summarized and analyzed the massive rulemaking record of 8,932 transcript pages, filing separate reports and recommendations with the Commission.

The rulemaking record documents that substantial consumer injury is caused by certain sales practices of many used car dealers. The record shows that dealers frequently misrepresent or fail to disclose essential facts about the mechanical condition of used cars or any dealer responsibility for making repairs after sale. Consumers with little or no information about the mechanical intricacies of automobiles are, as the record in this proceeding clearly establishes, frequently assured by dealers of the good overall quality of the car they are considering purchasing and are told that the dealer will correct any defects that are discovered after sale. Purchasers rely on those oral promises which generally are not put into sales contracts.

More than half of the used cars sold in this country are purchased and sold "as is". Such sales are perfectly legal in 41 states; however, the record of the used car proceeding reveals that many purchasers do not understand what an "as is" sale means. It means that the dealer has no obligation to repair anything that goes wrong after a used car is purchased and driven off the lot. When defects are discovered soon after sale—and the record here indicates that most mechanical problems arise within 10 days to a month after purchase—the consumer returns to the dealer seeking repairs as promised, having discovered the dealer's promises about the car's mechanical quality to be untrue, only to learn that the sales contract fails to record the seller's oral promise to repair. It is only then that most consumers come to understand the meaning of the term "as is", and it is because of that potential confusion that nine states prohibit "as is" sales of used motor vehicles. In any event, the consumer must pay to have the car repaired—a cost which must be added to the sales price to determine the true price of purchasing a used car.

To address these problems, the rulemaking staff recommended in 1978 that the Commission require inspection of all used cars sold by dealers, with inspection results to be disclosed on a window sticker bearing spaces for a dealer to check whether the major mechanical and safety systems of a car were either "OK" or "Not OK". This proposal was labeled the "mandatory inspection rule." The Commission solicited public comment on the staff's recommendation, and by February 1979, 1120 comments had been received. In September of that year, the Commission heard oral presentations from nine participants in the rulemaking selected as representatives of the various points of view presented during the proceeding. In October 1979, the Commission rejected the mandatory inspection rule. The Commission directed the staff to analyze an alternative that had been recommended by the Directors of the Bureau of Consumer Protection and the Bureau of Economics which provided for optional inspection of used cars and required dealers to note by each major system either "OK," "Not OK" or "No Promises." That "optional inspection rule,"

which would have included a requirement that "Not OK" be checked if a dealer knew of defects in the car whether from inspection or otherwise, was tentatively adopted in May 1980 and additional public comment was solicited. A total of 869 comments on the optional inspection rule were received.

After reviewing those comments, the Commission met for a third time in public session to consider the Used Car Rule. On April 14, 1981, we decided not to adopt the optional inspection rule. We close instead to eliminate any inspection component from the final Rule and to retain only those elements of prior versions of the rule that required the disclosure of information already in the hands of the dealer. The primary justification for the rule we ultimately promulgated in August 1981 is twofold: First, we found a need to counteract consistent verbal misrepresentations of both a used car's mechanical condition at the time of sale and its warranty coverage. Second, we found an equally pressing need to require the disclosure of correct information about both current mechanical condition and warranty coverage. Surveys, which are in the rulemaking record, reveal that of all the factors consumers weigh in making a used car purchasing decision, they consider mechanical condition at the time of sale by far the most important. The requirement that dealers disclose known defects ensures that consumers will get the information that they say is most important to them in considering a used car purchase.

The importance of this known defect information was recognized by one of the leading industry trade associations which both participated extensively in the Commission's rulemaking proceeding and will have a representative testifying before you today. In comments on the Used Car Rule filed in February 1979, the National Independent Automobile Dealers Association (NIADA) wrote:

"It is always difficult and often impossible to determine the exact condition of a used product. Its parts are worn and may have been subjected to abusive treatment by previous owners. Neither buyers nor seller can ever be certain that some latent defect which evades discovery will not surface after resale. Disclosure of significant known defects, however, would assure that consumers, who would possess the same information as the dealer about the car's condition, could bargain for a reasonable price and warranty coverage to reflect the car's known mechanical condition.

"NIADA believes that a beneficial balance in consumer and dealer knowledge can be achieved by means of a rule requiring a window sticker which would disclose both significant known defects and defects discovered during any state-required safety inspection. By 'significant known defects', we mean all defects which the dealer is personally aware of other than cosmetic or minor defects."

Despite widely disseminated press accounts of our final decision to reject both the "mandatory" and the "optional" inspection rules, a misperception appers to persist that the Used Car Rule promulgated by the Commission would require dealers to conduct inspections of the cars they offer for sale. The rule does not require dealers to inspect cars offered for sale. To emphasize that fact, we wrote in Section 455.6, which precisely states, "You are not required to inspect but you are required to disclose on the Buyers Guide any defects set forth below if known." Although most statutes we examined do not codify the meaning of "known," leaving it to the courts to define on a case-by-case basis, we explicitly set forth in Section 455.2(c) a legal standard of knowledge. According to that standard, a dealer has knowledge if he or she has "obtained facts or information about the condition of the car which would lead a reasonable person under the circumstances to conclude that the car contained one or more of the defects listed in Section 455.6 of this Rule." This language means that the dealer would only be liable if actual events occur that would have led a reasonable person to conclude that a defect exists. to clarify further the dealer's obligations under the Rule, we included an appendix to the Rule that gives examples of when a dealer would, and would not, be required to disclose a defect. Those examples make clear that an inspection is neither directly nor indirectly required.

The rule also provides for a six month delay between a decision by the Congress or the courts that it may become effective and its actual effective data. We will use this period to consult extensively with dealers about any other problems they may have in understanding their compliance responsibilities. All anticipated problems could then be incorporated in Compliance Guides to accompany the rule. If further problems arise, additional compliance guides could be issued or dealers can petition the Commission for advisory opinions concerning the intent of the rule.

We carefully attempted to ensure that consumers would understand the defect information on the Buyers Guide. We drafted language that we hoped would explain to consumers that the dealers are only obligated to disclose what they know, and that things may be wrong with a car that the dealers doesn't know about. We asked groups of people to examine the language, and we think that the language on the

window sticker is understandable in conveying to consumers how limited the defect disclosure is. It says:

"Dealers must tell you in the space below if they know about defects in this car's major systems. The defects that must be disclosed if known are listed on the back of this form. However, there may be defects that are unknown to the dealer. If nothing is listed, the car is not necessarily free of defects."

Although as I've said dealers are not required to inspect under any circumstances to comply with the rule, the record of the rulemaking proceeding demonstrates that many dealers know about the mechanical condition of the cars they sell. They know because their business requires that they know.

Dealers obtain used cars in two ways—as trade-ins and at auctions. Those who purchase at auctions can and almost always do inspect for defects after purchase and have an option to rescind or renegotiate the sale if they find sufficient problems with the car. Many auction facilities have rules requiring the disclosure of known defects by the selling dealer so that the buying dealer obtains knowledge of defects at the auction.

Even when not buying at auction, industry practice is to appraise a car before purchase. The appraiser typically takes the car for a road test, visually inspects the body and mechanical condition of the car, and estimates the extent of repairs needed to make it salable. I have attached to my testimony an article about the used car market from the Wall Street Journal of October 9, 1981, where this inspection process is discussed. Indeed, it is hard to imagine that a dealer could take the risk of providing a warranty without evaluating the car to some extent beforehand.

The experience in the state of Wisconsin is also instructive on this point. Wisconsin has a law, known as MVD 24, that requires dealers to inspect all used cars offered for sale in that state and disclose whether certain major mechanical and safety systems pass or fail inspection. The list of items that must be inspected under the Wisconsin law is more extensive than the list of defects that must be disclosed in the FTC rule. In addition, if an item does not pass inspection, the Wisconsin law requires disclosure of the probable cause of its failure.

A study by the Center for Public Representation evaluated the impact of the Wisconsin law, and found that two-thirds of the dealers in Wisconsin who responded did no more in the way of inspecting the cars they sold after MVD 24 went into effect than they had before. In other words, the study showed that most dealers already were inspecting their cars even when there was no legal obligation to do so.

Thus, the Wisconsin experience and the other evidence in the record tell us that dealers already know a great deal about the cars they sell. The FTC's rule does not require that dealers know or learn anything, but what they do know, they must share with the used car buyer.

I would like to address a few additional points that I understand to be of concern to the used car dealers. First, let us put to rest (finally, I hope) the matter of the leaning car. The dealer observes that the car leans to the left side. Leaning could be caused by several of the defects listed on the back of the window sticker. The dealer cannot determine which defect causes the car to lean without performing an inspection. Under the rule, this dealer has no obligation to inspect the car to discover what causes the car to lean. If the dealer suspects that mismatched tires are causing the car to lean and discloses in good faith that the tire sizes are mismatched, and later the consumer learns that the leaning is caused by a bent frame rather than mismatched tires, the dealer would not have violated the rule because he or she had made a good faith effort to comply. Those who make good faith efforts to comply with the rule do not risk prosecution.

Second, I am told that some read the rule to require inspections since several of the standards for determining whether a defect is present set out in Section 455.6 of the rule incorporate test procedures. The test procedures set out in that section are merely provided as a voluntary guide for those who suspect a subsystem may be defective but are uncertain whether the problem is serious enough to warrant disclosure. In other words, if a dealer knows that the subsystem would fail to meet the standards established by the test procedures, or if would fail to pass another test which ordinarily produces the same result, then a defect is present and should be disclosed.

I also understand that the used car dealers are now concerned that the standards for determining whether a defect exists are ambiguous. It is true that some of the conditions listed use such normative words as "abnormal" or "improper." For example, dealers must disclose if they know the car has "abnormal noise or vibration caused by faulty transmission or drive shaft" or "improper [transmission] fluid level or leakage, excluding normal seepage." The standards were adopted from the Wisconsin used car law I described earlier. In Wisconsin, where dealers have used the

standards for several years, a number of dealers who testified during the hearings indicated that they have no difficulty determining what is "abnormal" or "improper." A number of witnesses from outside Wisconsin also testified that the standards were concrete enough for decision-making.

I'd like to address one other point that has been raised about the experience in Wisconsin after implementation of that state's used car law. When discussing Wisconsin we must remember that the state law mandates inspection and mandates repair of safety defects. The FTC rule does neither. Nonetheless, some dealers have pointed to the fact that in Wisconsin after implementation of the law, the dealer share of the used car market declined and a shift to private sales occurred of approximately 10 percent.

The Commission believes after reviewing what evidence there is, that the decline in dealer market share in Wisconsin was caused in part by the mandatory nature of the Wisconsin inspection law, and in part by the requirement that dealers repair safety defects prior to offering the vehicle for sale. It would appear that some dealers were unwilling or unable to repair safety defects and may have left the market. Others may have been unwilling or unable to assume the responsibility for post-purchase repairs mandated if dealers checked items "OK."

The Rule that the Commission has adopted does not require safety repairs and in no way mandates post-purchase repairs. Dealer costs will not be increased since they will not be forced to make additional repairs. Therefore, there is no reason to believe that the experience of dealer exit from the market in Wisconsin is indicative of the likely impact of the Commission's Used Car Rule.

In contrast, the Wisconsin experience may provide some guidance on the question of whether the defect disclosure requirement of the rule will make it difficult for dealers to sell older cars. The median age of used vehicles; sold by dealers in Wisconsin is 5 years; that was true before MVD 24 was enacted and it is true now. Any movement at all appears to be in the direction of slightly older cars. Before the law, Wisconsin dealer sales of vehicles less than 6 years old were 58.8 percent of all dealer sales. After the law, dealer sales of cars in this age group fell to 52.2 percent of all dealer sales, showing a slight movement toward older vehicles. These sales of older cars are made despite the fact that dealers are obligated to (and the record shows that dealers do) disclose defects.

If the Used Car Rule goes into effect, it is of course possible that the prices of older vehicles will be reduced because dealers may be unable to obtain the prices they receive for these cars currently in the absence of disclosure. If that occurs, it will be the product of buyers' responses to accurate information regarding used cars.

The issue of dealer market share raises the question of why the Rule applies only to used car dealers. (The rule defines "dealer" as anyone who sells more than 5 used cars in a twelve month period.) The short answer is that coverage of private sales cannot possibly be justified either practically or legally. The record in this proceeding indicates that abuses which exist in the dealer market do not, for the most part, appear to exist in the private market. Consumers apparently are more likely to learn of defects before the sale from a private seller than from a dealer. Whether that is due to the nature of the buyer—perhaps one more likely to be knowledgeable about a car mechanically—or to greater candor by the seller who is operating in the virtual absence of any anticipation that the seller will repair any problems, we do not know. We do know that the FTC receives far more complaints from individual consumers regarding dealer sales than private sales.

As you consider whether to permit this Rule to go into effect, I urge you to keep in mind that the potential for consumer injury is greater today than it was when the Congress directed the Commission to consider promulgating a used car rule. Used car sales are increasing dramatically and that trend is likely to continue. The Wall Street Journal article I referred to earlier describes the rise in stark terms—the average price of a new car today is $10,000. It is hardly surprising to be told therefore that people are turning in record numbers to the used car market. Without the rule, these people may be turning in record numbers to the FTC, and to state and local law enforcement agencies to complain about misrepresentations, fraud, and deception resulting from these purchases. With the rule, consumers will have the information they need to decide whether to purchase a used car at the price and with the warranty coverage offered by the dealer.

This rule is the first promulgated under the Commissions Magnuson-Moss Act authority to be subject to the legislative veto provisions contained in the FTC Improvements Act of 1980. In a sense, then, we are—you and I—pioneers in the legislative veto process. For that reason, the Commission is especially pleased to be given the opportunity to testify here today. We believe that the rule we promulgated is soundly based on a complete record and is the least intrusive possible way to correct the substantial abuses documented in the record. According to the detailed

cost/benefit analysis prepared by the Commission's Bureau of Economics, the cost of complying with the rule should be minimal; indeed, we estimate that the price of printing the sticker (approximately 18 cents per copy) and the limited amount of time necessary to fill it out are the only costs directly traceable to the rule's requirements. We hope that after your own review of this proceeding you too reach this conclusion, and that you will decide no Congressional action is required under the legislative veto provisions, so that this rule may have its "day in court."

Thank you. And now I will answer any questions you may have.

[From the Wall Street Journal, Oct. 9, 1981]

A Used-Auto Bonanza Helps New-Car Dealers Survive Their Slump as Detroit Prices Divert Buyers to Secondhand Market, Causing Rise There Too

HORSE-TRADING JOB IN TOLEDO

(By Charles W. Stevens)

Toledo, Ohio.—Roberta Benton walked into Brondes Motor Sales here recently ready to buy a new Ford. She eyed a fancy black Mustang with a sun roof, but, at $7,800, it was too expensive. She checked out a smaller red EXP sporty coupe. But it was even more costly.

Then a salesman, Bill Wilson, sprang forward with an appealing deal: a 1978 Ford Thunderbird with a white vinyl roof, and loaded with optional equipment, for just $3,800.

The T-Bird was bigger and guzzled more gasoline than anything the 23-year-old woman had considered. Its odometer read 65,000 miles, and the dashboard clock didn't work. But the price was right. So Miss Benton agreed to buy the used car. "I really would prefer a new one, but there's no way I could afford the payments," she says.

Such events are becoming increasingly commonplace in auto dealerships these days. More people like Miss Benton who can't or won't pay the high price of a new car are buying used models instead. And a growing number of dealers are happy to oblige them, in the knowledge that selling secondhand autos may be their best hope for surviving the worst new-car sales slump in decades.

MONEY IN USED CARS

"Ninety percent of the new-car departments in the country are in the red," estimates Wendel Miller, a Binghamton, N.Y., dealer who heads the National Automobile Dealers Association. "The leading savior of dealers who are breaking even or are profitable is their success in used cars," he says.

Indeed, demand for used cars is red-hot. Good, clean late models are bringing premium prices—and often handsome profits. Even some clunkers are selling. And unlike some new cars, which may sit in inventory for months, popular used models will sometimes exit from the lot the day they arrive.

"At one time, used cars were a problem" for new-car dealers, says Bill Burkley, who sells Buicks and Hondas in White Bear Lake, Minn. Today, dealers can't lay their hands on enough secondhand automobiles. With no factory to order from and the new-car slump staunching the usual flow of trade-ins, dealers are hunting used-car auctions and culling newspaper ads for units to buy and resell.

Of course, a big market has always existed for used cars. Millions of Americans never buy anything else. Between 15 million and 18 million used autos have changed hands every year for at least the past decade, according to a survey by Hertz Corp., the big car rental and leasing concern. Last year, Hertz estimates, a record 18.7 million used autos were sold, compared with only 8.9 million new cars. Nor is there any mystery about why they sell. "The great mass of American motorists buys used cars for just one reason," a Hertz spokesman says. "They're cheaper."

INFLATED PRICES

Lately, however, more people than usual seem to be reaching that conclusion. So many people, in fact, that they're bidding up the prices that made used cars attractive. From January through mid-September used-car prices increased about 31 percent according to Automotive Market Reports, an industry publication that monitors used-car sales activity. Some popular late models today are worth more

than they were a year ago, despite their being a year older. The rise has been big enough that used cars now are cited as one of the forces pushing up the government's consumer price index.

"It's unbelievable. Prices are very strong and will continue to be so," predicts James H. Lawarence, the editor of the monthly used-car price guide published by the National Automobile Dealers Association.

Nonetheless, used cars are still a lot cheaper than new ones. The average sticker price of a new model exceeds $10,000. A year-old car typically costs 31 percent less than a new one, and a two-year-old vehicle runs about 46 percent less. Additional savings accrue because insurance premiums on older cars tend to be lower and because buyers need to finance less of the purchase price on a less expensive car. "People have to buy something, so they're buying what they can afford," says Mr. Lawrence.

That's fine with many new-car dealers. After watching some 1,650 of their colleagues go out of business last year because of meager volume and high interest rates, they're delighted with the profits that used cars can bring. "If it weren't for used cars, I'd be very deeply in the red," says Morton C. Mallory, a St. Louis Buick dealer. Instead, profits this year are up 20 percent, he says, because of stepped-up efforts to sell second-hand autos.

A DEALER SHIFTS GEARS

The operations of Brondes Motor Sales here show how one dealership is coping with the protracted new-car sales slump by aggressively pursuing used-car buyers. Some fresh attitudes and a lot of hard work are required to make the strategy pay off. Brondes' used-car department has taken over as the primary source of profit while the new-car showroom loses money.

From January to July this year, Brondes's new-car sales averaged 53 units a month, down 23 percent from the comparable pre-slump period two years ago. But current used-car sales of 61 units a month are matching the 1979 pace. "The new-car salesmen wish they were used-car salesmen now," says Phil Brondes, Jr., the company's president. Indeed, some of them are doing double duty. Mr. Brondes recently moved some late-model used Fords in next to the 1981 models on his new-car lot to "give new-car salesmen a better shot at making sales," he says.

There's money in it for both salesmen and dealership. Consider the chain of events that finally put Miss Benton, the disappointed new-car shopper, behind the wheel of a $3,800 used Thunderbird. It all started with the sale earlier the same day of a new full-sized Ford LTD for $10,612. On that deal, Brondes lost $414. Although it sold the LTD for $400 above the wholesale price, $100 of that sum went to the salesman as a commission. And the dealership incurred another $714 in interest charges because the car had been sitting on the lot for four months.

But as part of that deal, Brondes got the T-bird for a $2,600 trade-in allowance. Selling it hours later for $3,800 produced a quick $1,200 gain. The salesman collected a $462 commission; the dealership got the rest, washing out a loss on the new-car transaction and leaving Brondes $324 ahead on the two deals.

"It's crazy," says Jack Cook, the used-car manager. "At this time, a new car is a liability. It only helps you in getting a used car that you can sell at a profit."

That's why at Brondes, getting a good trade-in can be nearly as important as making a sale. New-car manager Clyde Stedke keeps this in mind while appraising a 1978 Ford Fairmont Futura brought in by a new-car prospect. Driving it around the block, Mr. Stedke tries to get a "general feel" for the car—whether it is "tight" and in good shape or "loose," which indicates to him that the car may have been abused. He comments favorably on the Futura's smooth-shifting transmission and declares it a "straight car"—a good automobile albeit one that lacks fancy accessories.

Then he gives it a once-over, noting chipped paint and peering under the hood. "You really don't know what you're looking for here," he confesses, "except evidence of an accident." He sees that at some time the entire front end had been repainted. "But that's okay," he concludes. "When you step away, you don't notice."

BOOK VALUE PLUS

Mr. Stedke estimates the car will need $250 in reconditioning before it can be put up for sale. But it has only 22,000 miles on it. "I really want this car," he says. "It has good eye-appeal." The published "book value" is $2,775, but Mr. Stedke is willing to offer $3,100. He figures the car could bring $4,000 in the current market.

With new-car sales depressed, however, there aren't nearly enough trade-ins to keep the used car lot stocked. So another salesman, Dick Quinlan, has been made a

full-time used-car buyer. He visits dealers who sell rival makes to look at their merchandise. "Some (non-Ford) dealers don't like Fords," he says. "They can't sell them off their lots" as easily as a Ford dealer can. He also nurtures his own private sources, such as the local leasing company where he occasionally picks up a low-mileage late-model bargain.

He slugs it out with his competition from other dealerships at two weekly auctions in Detroit and in Flint, Mich. At one such sale, he spots a 1979 silver Ford LTD driven just 28,000 miles. Before it goes on the block, he tries to buy it (for $4,200) directly from the wholesaler who owns it. But somebody has beaten him to the punch. The wholesaler suggests Mr. Quinlan buy instead a 1979 Mercury Gran Marquis for $4,350. Mr. Quinlan takes it. "You kind of play ball," he shrugs.

A poker-faced, modern-day horse-trader, Mr. Quinlan quietly bids on a half-dozen cars but buys just one—a blue Mustang for $4,125 that he thought needed only some touch-up paint. Later he notices a broken sun-roof latch. "It's always something," he says with a sigh.

CHECKING THE WANT ADS

When all else fails, Mr. Quinlan sits down with the newspaper classifieds, as if he were an individual car buyer. He finds the tactic especially useful when he's looking for a certain car. "If we need station wagons, we can take one off someone's hands in 15 minutes" that way, he says.

In fact, the ability to switch from one kind of car to another as market conditions warrant is one of the appeals of the used-car game, Mr. Brondes explains. "It's an easier market to adjust to. Fairmonts may be hot one month and die the next. We can adjust within a few days (by acquiring what's hot and auctioning off the losers). But with new cars, you're locked into orders from the factory months in advance," he says.

Also each used car has its own "personality," salesmen say. "You can't make money selling new cars because five other Ford dealers can sell your customer exactly the same thing," contends used-car salesman Gordon Ponceby. "But on the used-car lot, I'm the only guy who has this specific car." Customers may compare similar cars, but it's almost impossible to find two used cars for sale that are identically equipped and in equivalent condition.

TO BUY OR NOT TO BUY

But in the end, the judgment to buy or not relates to price most of the time. For example, a newspaper ad for a 1980 Ford Granada brought Donald J. Whitzell to Brondes's used-car lot. Mr. Whitzell, a large man, was looking for something a bit bigger than his little 1979 American Motors Spirit. He shopped for a new AMC Concord sedan "but they wanted $8,000," he says. At $5,995, the Granada was the right size for a lot less cash.

Moreover even though Mr. Whitzell no longer wanted the Spirit, Mr. Cook, Brondes's used-car manager, did. He appraised it for $2,925, but gave Mr. Ponceby, the used-car salesman a signal that he could go higher if needed. "It only had 19,000 miles on it," he explains. So when Mr. Ponceby offered $3,300, Mr. Whitzell happily drove off in one used car, and Brondes Motors just as happily rolled another onto its lot.

USED CAR BUYERS GUIDE

IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

VEHICLE MAKE | MODEL | YEAR | ID NUMBER

NOTICE: For your protection and safety

Ask about the current condition of the following major mechanical and safety systems of this car. See below which of these systems, if any, are covered by a warranty and which systems are known by the dealer to contain major defects. Dealers must inform you in writing if they know of certain defects in this car's major systems.

Frame & Body	Brake System
Engine	Steering System
Transmission and Drive Shaft	Suspension System
Differential	Tires
Cooling System	Wheels
Electrical System	Exhaust System
Fuel System	Accessories

PRE-PURCHASE INSPECTION: Ask the dealer if you may have this car inspected by your mechanic either on or off the lot.

WARRANTIES FOR THIS CAR:

☐ NO IMPLIED WARRANTY—"AS IS". This means you will pay all costs for any repairs needed when you buy the car or after the time of sale. If this box is checked, the dealer makes no written promises about this car's condition.

☐ FULL ☐ LIMITED WARRANTY. The dealer will pay ____% of the total repair bill for covered systems that fail during the warranty. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations. Under state law, "implied warranties" may give you even more rights.

SYSTEMS COVERED:	DURATION:

☐ SERVICE CONTRACT. A service contract is available from _____ for $ _____ extra. This service contract adds to the dealer's responsibilities under any warranty. If you buy a service contract within 90 days of the time of sale, state law "implied warranties" may give you additional rights.

MAJOR KNOWN DEFECTS: Dealers must tell you in the space below if they know about certain defects in this car's major systems. The defects that must be disclosed if known are listed on the back of this form. However, there may be defects that are unknown to the dealer. If nothing is listed, the car is not necessarily free of defects.

See the back of this form for important additional major defect information.

Below is a list of some major defects that may occur in used cars.

Frame & Body
- Frame-cracks, corrective welds, or rusted through
- Dogtracks—bent or twisted frame

Engine
- Oil leakage, excluding normal seepage
- Cracked block or head
- Belts missing or inoperable
- Knocks or misses related to camshaft lifters and push rods
- Abnormal exhaust discharge

Transmission & Drive Shaft
- Improper fluid level or leakage, excluding normal seepage
- Cracked or damaged case which is visible
- Abnormal noise or vibration caused by faulty transmission or drive shaft
- Improper shifting or functioning in any gear
- Manual clutch slips or chatters

Differential
- Improper fluid level or leakage excluding normal seepage
- Cracked or damaged housing which is visible
- Abnormal noise or vibration caused by faulty differential

Cooling System
- Leakage, including radiator
- Improperly functioning water pump

Electrical System
- Battery leakage
- Improperly functioning alternator, generator, battery or starter

Fuel System
- Visible leakage

Inoperable Accessories
- Gauges or warning devices
- Air conditioner
- Heater & Defroster

Brake System
- Failure warning light broken
- Pedal not firm under pressure (DOT specs.)
- Not enough pedal reserve (DOT specs.)
- Does not stop vehicle in straight line (DOT specs.)
- Hoses damaged
- Drum or rotor too thin (Mfgr. specs.)
- Lining or pad thickness less than 1/32 inch
- Power unit not operating or leaking
- Structural or mechanical parts damaged

Steering System
- Too much free play at steering wheel (DOT specs.)
- Free play in linkage more than 1/4 inch
- Steering gear binds or jams
- Front wheels aligned improperly (DOT specs.)
- Power unit belts cracked or slipping
- Power unit fluid level improper

Suspension System
- Ball joint seals damaged
- Structural parts bent or damaged
- Stabilizer bar disconnected
- Spring broken
- Shock absorber mounting loose
- Rubber bushings damaged or missing
- Radius rod damaged or missing
- Shock absorber leaking or functioning improperly

Tires
- Tread depth less than 2/32 inch
- Sizes mismatched
- Visible damage

Wheels
- Visible cracks, damage or repairs
- Mounting bolts loose or missing

Exhaust System
- Leakage

DEALER

ADDRESS

SEE FOR COMPLAINTS

IMPORTANT: The information on this form is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purpose of test-driving) is a violation of federal law (16 C.F.R. 455).

Defect disclosure specifications are printed in Volume 16 C.F.R. (Code of Federal Regulations) Part 455.

QUESTIONS OF SENATOR KASTEN AND THE ANSWERS THERETO

Question. Please assume, as NADA and NIADA believe, that the Used Car Rule will operate in many cases to require that dealers inspect used cars prior to sale. What then will be the cost to used car dealers of the FTC's proposed Rule? Do you agree with Mr. Eikenberg of the NIADA that the cost of such an inspection could range from $100 to $250 per vehicle? How much of this cost would be passed on to consumers, and how much would reduce dealers' profits? Please quantify your estimates of cost, if possible, and draw from the experience in Wisconsin and elsewhere.

Answer. The Commission understands that representatives of NADA and NIADA have expressed concern that the Used Car Rule will somehow "operate" to require inspections of used cars. The used Car Rule does not require inspections and the Commission is firmly of the belief that it will not "operate" to require inspections. It is clear, also, that no used car dealer will ever be prosecuted under the Rule for failing to inspect a used car.

In past years when the Commission was considering the promulgation of a rule which would provide for either mandatory or optional inspections of used cars, the Commission did examine data on the cost of inspections. That data is drawn primarily from the experience in the state of Wisconsin with that state's mandatory inspection and disclosure law.

A study by the Center for Public Representation evaluated the impact of the Wisconsin law on used car dealers. Approximately two-thirds of the dealers responding in the study reported that the Wisconsin law did not cause them to do more inspections than they otherwise already performed in the normal course of their business and therefore that the law did not add any inspection costs. (Table V-8). Dealers reported that inspection costs to comply with the law ranged between $6.75 and $50; most estimated the cost to be between $15 and $30 (Table V-9).[1]

However, even where the inspection caused increased costs, it appears that those costs were not passed on to consumers in the form of higher prices for used cars. The study reveals that used car prices have fallen in Wisconsin since the passage of the state law.

Question. If you do not believe the cost of inspections is properly attributable to the FTC Rule, or if there are other costs of the Rule besides the cost of inspections, please expand on your answer. What are the costs of the Used Car Rule, in your view?

Answer. Since the Rule explicitly states in § 455.6 that inspections are not required, the cost of any inspections which dealers may otherwise perform are not properly attributable to the Rule.

The costs of the Used Car Rule, in our view, are of two basic types: (1) the time it takes to fill out the window sticker with information already in the dealer's possession, and (2) the price of printing the stickers. The record indicates that both types of costs should be minimal. Printers consulted by the Commission have estimated the cost of the sticker to range from 15 to 20 cents a piece. Filling out the form itself should take no more than a few minutes.

Question. Please explain how the Commission enforces its trade regulation rules. If a dealer fails to disclose six defects on a car that he knows about, how much will he be fined?

Answer. Before launching any rule enforcement program, the Commission commits extensive resources to educating the industry and the consuming public about industry obligations under a trade regulation rule. Through press releases, consumer and industry educational materials, speeches, personal meetings of Commissioners and staff with industry, and publication of compliance manuals, the Commission attempts to clarify the industry's compliance obligations. Frequently, these efforts involve working with trade associations to disseminate information to their members about a rule's requirements and to enlist their cooperation in encouraging voluntary compliance by their members.

The Commission's experience has been that its intensive efforts to inform an industry about a rule's requirements have resulted in extraordinarily high levels of voluntary compliance. Thus, the Commission is only compelled to turn to formal enforcement action in a small minority of cases.

The enforcement history of the Commission's Holder-in-Due-Course and Mail Order Rules illustrate the Commission's enforcement policies. The Holder-in-Due-Course Rule (Preservation of Consumers' Claims and Defenses) covers many millions of sellers. Since it became effective on May 14, 1976, the Commission has recom-

[1] The tables referred to have been placed in the committee files.

mended to the Department of Justice and the Department of Justice has then brought seven law enforcement actions involving Rule violations; of these, five resulted in consent settlements before a complaint was filed and two are in litigation. In addition, three non-public investigations involving possible rule violations are currently pending.

With regard to the Mail Order Rule, which became effective on February 2, 1976, the Commission has initiated 55 formal investigations. Of these, 40 were closed with no action taken by the Commission, 4 resulted in consent agreements, 2 are currently in litigation initiated by the Department of Justice, and 9 investigations remain open. There are at least 6,000 mail order sellers who are covered by the Mail Order Rule.

As the above histories indicate, the large majority of rule enforcement cases have been settled by the mutual consent of the Commission and the respondent company. The civil penalties assessed in these cases have varied greatly; in determining the appropriate amount of penalties, the Commission considers, as required by the Magnuson-Moss/FTC Improvements Act: The degree and nature of the violations alleged; the history of the company's prior conduct; the company's ability to pay; any effect on the company's ability to continue doing business; and "such other matters as justice may require". 15 U.S.C. § 45(m)(1)(C).

In defining "such other matters as justice may require", the Commission considers the injury to the public caused by the alleged violations, the profit ("unjust enrichment") derived directly from the unlawful practice; the good or bad faith of the company involved; the need to deter other potential law violators; and the cost of any consumer redress or other affirmative educational programs the company has agreed to undertake as part of the consent settlement.

It should be noted that, for all these rules, formal Commission action is but a small part of the Commission's effort to secure compliance with its rules. Numerous violations or potential violations are resolved informally by Commission staff through letters or phone calls.

In the case of the Used Car Rule, to enforce for failure to disclose a known defect, the FTC has the burden of proving that a dealer had knowledge (§ 455.2(c)). To meet that burden, the FTC would have to demonstrate that a reasonable person under the circumstances would have concluded that the particular defect was present in the car. This is a substantial burden, and requires the factfinder to weigh the evidence. Because this burden is substantial, the FTC will enforce for violations of the Rule only where patterns of abuse can be demonstrated. Dealers who make good faith efforts to comply will not risk prosecution.

If a dealer fails to disclose six defects (for example, cracked engine block; leaking battery; insufficient brake pedal reserve; slipping clutch; bent frame; and inoperable defroster) that he knew about and it became apparent that the dealer had repeatedly failed to disclose multiple defects known to him, the Commission may seek to enforce the rule against that dealer. If negotiations with the dealer did not result in a settlement, then the Commission would recommend a complaint. The Commission would then notify the Department of Justice and ask the Attorney General to file suit against the dealer on behalf of the Commission. If the Department of Justice believed the case was meritorious, it would then file suit in the proper United States District Court. That court would hear the case and decide on the appropriate civil penalty. If the Department of Justice were to decline to file the case, the Commission could consider filing the case itself in a federal district court.

The amount the Commission would seek in negotiations or in a complaint would, as the above discussion suggests, depend upon a variety of factors in addition to the number of failures to disclose known defects. Thus while the statute allows for $10,000 per violation, the Commission would consider whether a pattern of violations exists, the gravity of the violations, the good or bad faith of the potential violator and the relative size of the company in determining whether a penalty is appropriate, and if so, in what amount.

Question. The Commission claims that a major problem in the used car market involves the failure of dealers to disclose known defects. Why has the FTC not brought any cases under § 5 of the FTC Act against dealers for failure to disclose known defects?

Answer. It is the Commission's policy not to undertake individual administrative cases when the Commission is in the process of considering an industry-wide trade regulation rule. Therefore, from 1976 through the present, the Commission has not brought any complaints against individual dealers for failures to disclose known defects under § 5 of the FTC Act. It is important to note, however, that before the rulemaking proceeding was initiated, the Commission did sue one used car dealer for deceptive acts in violation of § 5. In *Peacock Buick, Inc.*, 86 F.T.C. 1532 (1975), the Commission ordered the respondent to cease and desist from, inter alia, "mis-

representing, orally or in writing, directly or by implication, the nature and extent of the previous use or condition of any used vehicle displayed, offered for sale, or sold." (emphasis added).

Finally, the Commission believes that, given the large number of small to medium sized dealers in the used car industry, rulemaking is a more appropriate response to evidence of widespread misrepresentations than case-by-case enforcement. A rule provides uniform standards for the industrys as a whole and should promote more efficient compliance than would necessarily selective adjudications.

QUESTIONS OF SENATOR GORTON AND THE ANSWERS THERETO

Question. Assume a leaking radiator which could be caused by one or more of five items on the list of defects in the Rule. Wouldn't the dealer have to inspect to comply with the obligations under the Rule?

Answer. No. The Rule explicitly states that a dealer is not required to inspect; a dealer is required only to disclose the presence of any of the defects listed on the window sticker if he knows they exist (§ 455.6). If a dealer knows the radiator is leaking but does not know the precise cause of the leakage he has no obligation to inspect to discover the cause. The purpose of the Rule is not to require that dealers discover the cause of any problems with their cars, but rather that they share what they already know with consumers (within the limits of the list on the window sticker) so that consumers may make informed purchasing decisions. In the case of a leaking radiator known by the dealer to be leaking, the dealer would comply with the Rule by writing on the Buyers Guide—"Cooling System, Leakage Including Radiator."

Question. The Rule tells dealers to treat all vehicles the same and not to use lower standards for older or cheaper vehicles when deciding whether to list an item as defective. Why does this Rule include that provision and how is a dealer to comply with that requirement?

Answer. The Rule includes this provision because state and federal inspection standards which form the basis for the list of defects included in the rule do not differentiate based on the age of the vehicle. The Wisconsin law, for example, does not permit differentiation based on the age or price of the vehicle. In addition, this provision simplifies dealer compliance with the Rule. If the Rule required dealers to differentiate on the basis of age, dealers would be required to apply an infinite number of differing standards for the required disclosures. Should the Rule go into effect and known defects are disclosed as it requires, consumers will undoubtedly evaluate that information in the context of the age of the car they are considering.

Question. Didn't the Wisconsin inspection and disclosure law cause a shift away from dealer sales to the private market?

Answer. According to dealer testimony in the rulemaking record, the general trend in the used car market has been a gradual shift away from dealer sales. This is also true in Wisconsin. In the two years prior to the passage of the Wisconsin used car inspection and disclosure law, dealer sales accounted for 55.1 percent of all used motor vehicle sales in Wisconsin. Two years after passage of the law, dealer sales accounted for 45.6 percent of all used motor vehicle sales in Wisconsin.

A study in the rulemaking record measured the impact of the Wisconsin law. It is possible to conclude from that study that the decline in dealer market shares in Wisconsin may well have been due in part to aspects of that state's used car law—aspects, which however, are not a part of the Used Car Trade Regulation Rule promulgated by the Commission. Specifically, the Wisconsin statute requires that prior to offering a car for sale dealers *must* inspect the car and further that they must repair any safety defects discovered in the course of those inspections. Further, the law requires that if, following the inspection, a dealer marked a mechanical system "OK," the dealer *must* perform (at the dealer's cost) post-purchase repairs should that system fail. It is entirely possible that some dealers were unwilling or unable to comply with the pre- and post-purchase repair requirements of the Wisconsin law and chose instead to leave the market.

The Rule that the Commission has adopted does not require inspections, safety repairs or post-purchase repairs. The costs entailed by the FTC Rule would be only those incurred by having the window stickers printed and the few minutes required to fill out the sticker. Therefore, there is no reason to believe that the decline in dealer market share in Wisconsin which may be attributable to that state's mandatory inspection and safety repair law is in any way indicative of the potential impact of the Used Car Rule.

Question. Aren't the standards for defect disclosure vague?

Answer. To provide dealers with a clear delineation of their responsibilities under the Rule, the Rule includes a detailed list of defects that must be disclosed if known to the dealer. This list, printed on the reverse side of the window sticker, defines the *total* universe of defects which must be disclosed if known.

The most frequent criticism of the standards for disclosure of defects concerns the use of such terms as "abnormal" and "improper," e.g., "abnormal [transmission] noise or vibration" or "improper [differential] fluid level of visible leakage, excluding normal seepage." Some have characterized those words as too vague for dealers to use in determining whether a defect exists.[1] Those standards were adopted from the state of Wisconsin's law (MVD 24) regulating the sale of used cars. In Wisconsin, where dealers have used the standards for several years, a number of dealers who testified during the hearings indicated that they have no difficulty determining what is "abnormal" or "improper" or otherwise making the decisions required by MVD 24.[2] In addition, a number of sources outside Wisconsin, including a dealer, two automotive investigators, and a vocational school automotive instructor, also found the list derived from MVD 24 sufficiently concrete for decision-making.[3]

The development of the defect list is revealing on the question of vagueness. A recommended defect standard was first publicly circulated in mid-1976.[4] The content of the list of defects which must be disclosed if known was the subject of extensive comment throughout the rulemaking proceeding. The list of defects that must be disclosed if known under the rule ultimately promulgated by the Commission relate to both safety and non-safety (mechanical) components.

The non-safety (or mechanical condition components) include such major systems of a car as the engine, transmission, and differential. These items are derived from the law in the state of Wisconsin. The safety items that must be disclosed on the Buyers Guide if known are derived from the model state safety inspection guide prepared by the U.S. Department of Transportation, National Highway Traffic Safety Administration, pursuant to Section 402 of the Highway Safety Act of 1966, P.L. 89-563.[5]

The list of defects that must be disclosed in Wisconsin pursuant to MVD 24 was developed with considerable input from experts. As originally drafted in 1972, the Wisconsin regulation called for disclosure of accident damage over a certain dollar amount and "all known significant mechanical and structural defects and damage" without any checklist specifying what defects had to be noted.[6] This open-ended type of defect disclosure, criticized for its vagueness, was suspended by a legislative committee before going into effect.[7] The current MVD 24 checklist of non-safety, mechanical items was subsequently drafted by a committee which included state officials, used car dealers, and consumer groups; one dealer in particular is credited as the author of much of its technical language.[8]

The list of major non-safety items derived from MVD 24 also received considerable comment during the Commission's rulemaking proceeding. Substantial information supports the adequacy of Wisconsin's list of items,[9] although a number of persons also suggested minor additions or deletions.

The protocol from which the list of safety-related defects derives was designed for vehicles with a Gross Vehicle Weight Rating (GVWR—a vehicle's maximum loaded weight) of 10,000 pounds or less pursuant to the Highway Safety Act of 1966 by the Department of Transportation (DOT)/National Highway Traffic Safety Administration (NHTSA).[10]

The list of items included in the DOT safety system inspection protocol was based on extensive information that the systems inspected—the brakes, steering, suspension, tires and wheels—bear directly on a vehicle's safe operation.[11]

The safety-related defects disclosure of the rule is limited to these five major areas. In fact, under many state inspection schemes, defects in additional items often must be disclosed and/or repaired. They include the muffler, horn, glass, mirrors, exhaust emission control, lights, wipers, turn signals and reflectors. Al-

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[1] Staff report at 157, n. 202.
[2] Id. at 158, nn. 203, 204.
[3] Id. at 159, n. 206.
[4] A prototype form was circulated that included a "Not OK" check. The issue of defect disclosure was raised in 1976 by that form.
[5] 23 U.S.C. sec. 402 (1976).
[6] Wolford, State official, TR 976; Wolford, et al., State officials, L-52 at 6-7.
[7] Krohn, et al., State officials, L-19 at 1-2; Wolford, State official, TR 976.
[8] Moschkau, State official, TR 1022-23, 1029-30.
[9] Staff Report at 154, n. 194.
[10] 49 CFR Part 570-A.
[11] Vetter, DOT, HX 181 at 7-8.

though a number of witnesses and comments criticized the staff's omission of many of these additional items,[12] the Commission has adopted the more limited DOT list of items, given their proven relation to safety and the fact that many of the additional items should be apparent to the lay purchaser.[13]

Thus, considerable information in the record establishes that the items that must be inspected under MVD 24 and the DOT inspection protocol are appropriate items to comprise a list of defects that must be disclosed if known by the dealer.

Question. Why don't states regulate used car sales?

Answer. Obviously every state could, as Wisconsin and Maine have, adopt comprehensive disclosure laws regulating sales of used cars. The Commission does not know why most states have not done so. We do know from the record of our used car proceeding, which contains evidence from all parts of the country, that oral misrepresentations by used car dealers concerning warranty coverage and their cars' mechanical condition occur throughout the country. In fact, during the rulemaking proceeding, the Commission received comments from 37 state and 46 local officials supporting federal regulation in this area. Our rule specifically provides that any state that has (or in the future should enact) a law or regulation which affords the minimal (or greater) disclosure protection afforded by our rule can be exempted from it. In other words, for example, because there is a law in Wisconsin dealing with used car sales which is decidedly more encompassing than the FTC rule, Wisconsin can obtain an exemption and the rule would not be applicable in that state.

Question. Doesn't the Rule mandate implied warranties?

Answer. No, it does not. Under the laws of 49 states and the District of Columbia an implied warranty always exists in the sale of any product unless specifically disclaimed by the seller. The Rule will not affect those state laws one way or the other. Forty-one states allow used car dealers to sell cars "As Is" and thus disclaim the implied warranty that would otherwise arise under state law. The Rule again would not affect those laws. It would only require disclosure on the window sticker if the car is being sold "As Is." If the dealer sells with a warranty, implied warranty rights arise under state law. The rule does not affect that situation in any way, it only requires disclosure on the window sticker of any warranty the dealer may offer.

In its testimony on the used car rule, the National Independent Automobile Dealers Association argued that the rule mandates implied warranties since "the listing of 'known defects' will imply to the consumer . . . that all other systems are perfect," thereby creating an implied warranty. That is incorrect.

The Rule's window sticker clearly states that defects may be present in the car which are unknown to (and thus undisclosed by) the dealer. The sticker also states that "If nothing is listed, the car is not necessarily free of defects." Implied warranties, therefore, will not arise as to any system of the car not listed by a dealer as defective. Furthermore, it is apparent from consumer testing of the sticker language conducted by the Commission that consumers will understand the limited nature of the defect disclosure and that the disclosure obligation is limited to what dealers already know about the car.

Question. Why doesn't the rule differentiate between cold and warm climates in defining the defects that must be disclosed if known?

Answer. The list of defects was designed to apply on a nation-wide basis to all cars no matter where sold or in what kind of climate. In fact, to simplify the form, the Commission deleted several defects that had regional importance only, such as "inadequate antifreeze". To differentiate between cold and warm climates in defining defects would complicate the rule enormously for dealers without a justifiable consumer benefit.

Question. What kind of used car rule did the NIADA recommend in its February 1979 statement to the FTC? How does that recommendation compare with the final FTC rule?

Answer. In post-record comments filed in February 1979, NIADA urged the Commission to reject the mandatory inspection rule recommended by the Commission's staff. In its place, NIADA recommended that the Commission adopt a rule that would require a window sticker which would disclose significant know defects and defects discovered during any state-required safety inspection. NIADA defined "significant known defects" as "all defects which the dealer is personally aware of other

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[12] Dealers: Newton, TR 7813; Hall, D-60; Rankin, D-132; Andrews, TR 4184-85; Bigham, TR 6932.

[13] However, based on recurring comments in the record, the Commission decided to add to the defect list one item, "exhaust system—apparent leaks". This additional item, included in every state's safety inspection except Tennessee's, has a clear relation to safety.

than cosmetic or minor defects." The NIADA sticker would have explained in clear and concise language the meaning of "as is" sales in regard to warranty coverage and allocation of repair costs, and would have cautioned buyers against relying exclusively on oral statements made by the seller. NIADA's proposal also would have required dealers to list the cause of each defect, and indicate the prior use of the vehicle, if known.

The FTC rule differs from the NIADA recommendation by limiting the defect disclosure to a list of specific defects that must be disclosed, if known, rather than the open-ended defect disclosure proposed by NIADA. Also, unlike the NIADA proposal, the FTC rule does not require that dealers analyze the cause of each defect, nor must prior use be disclosed. The FTC rule, therefore, is less burdensome than NIADA's recommendation.

During hearings before the Senate on the Used Car Rule, NIADA took the position that the known defects disclosure rule it had proposed was substantially less stringent than the Commission's rule because the standard of knowledge under the NIADA proposal was different. The NIADA proposal says dealers must disclose defects "which the dealer is *personally aware of*" (emphasis added). The Commission's rule says dealers must disclose defects if "*the dealer has obtained facts* [in the normal course of business] *that would lead a reasonable person under the circumstances to conclude* that one or more of the defects listed in § 455.6 was present". (emphasis added) Under the Commission's rule, the dealer only has knowledge if facts come to his attention in the normal course of business which would lead a court to conclude that he must have known a specific defect listed on the back of the form is present. The Commission believes that a court attempting to apply NIADA's standard of knowledge ("defects of which the dealer is personally aware") to a particular case would in fact ask the same question as it would ask using the rule's standard of knowledge: has the Commission proved circumstances under which a dealer must have concluded that a specific defect existed?

Question. How does the rule respond to the concerns expressed by members of Congress about prior versions of the rule during the 96th Congress?

Answer. During the 96th Congress, various Members of Congress, in the course of the FTC reauthorization process, expressed concern that the Commission not promulgate a used car rule that would mandate warranties or require inspections. These concerns were expressed in various committee reports and amendments to the legislation that became the FTC Improvements Act of 1980. Subsequently, the Commission rejected staff recommendations for a mandatory, and then an optional inspection rule. The former would, of course, have required inspection of used cars prior to sale and the latter arguably would have caused warranties to arise under state law. The rule promulgated by the Commission neither requires inspection nor causes warranties to arise.

Senator KASTEN. In the interests of time, I am going to ask Thomas Greene, National Automobile Dealers Association, and Joseph Eikenberg, past president, National Independent Auto Dealers, to come forward together. There are travel problems, as everyone is aware. The hearing has run longer than we expected.

It is the understanding of the chairman that, Mr. Greene, that you have, or you possibly have a travel problem. Would you like to go first? And then why don't you testify first. Mr. Eikenberg, you're second, and then if you have to leave in the middle of questions back and forth, go ahead.

Mr. Thomas Greene, National Automobile Dealers Association, Washington, D.C.

STATEMENTS OF H. THOMAS GREENE, EXECUTIVE DIRECTOR, LEGISLATIVE AFFAIRS, NATIONAL AUTOMOBILE DEALERS ASSOCIATION, ACCOMPANIED BY WENDELL MILLER, PRESIDENT; AND JOSEPH EIKENBERG, PAST PRESIDENT, NATIONAL INDEPENDENT AUTO DEALERS ASSOCIATION, ACCOMPANIED BY MICHAEL R. LEMOV

Mr. MILLER. Just preceding Tom Greene for a moment, I would like to make a few remarks as president of the NADA.

I appreciate your moving us up on the schedule a little bit. I have a responsibility to a few of our dealers in the State of Florida, but I can assure you that except for survival, there is nothing more important to the 20,000 franchise dealers in this country than this FTC rule and your deliberations on the subcommittee at this time.

I am Wendell Miller, a Dodge, Honda, Lincoln, Mercury dealer from Binghamton, N.Y. I represent 20,000 franchised new car and truck dealers, domestic and import, as president of the National Auto Dealers Association.

As all of the members of this subcommittee are fully aware, our national economy is in trouble. The automotive industry is bearing the brunt of our national economic problems, and the retail dealers I represent are bearing the brunt of the automobile industry's problem. Domestic new vehicle sales in 1980 were the lowest in 18 years. 1981 has been no better. The attrition rate of the small business franchised dealer is staggering; 2,500 have closed their doors in the last 24 months. With no immediate change in our economy, the potential for an increasing rate of failure is increasing. Many dealers are simply hanging on by their used-car departments. And with any reduction in sales, they would be forced to close their doors.

It is apparent to us that this Commission's activity and action in enforcing the used-car rule indicates a total insensitivity and lack of concern for the plight of the retail franchised automobile dealer and to the current economic condition in the real world. The rule will force more retail used-car sales to the private market, now taking over 50 percent of our national sales, and even more unfairly will remain totally unregulated. From a franchised dealer's standpoint the rule is ambiguous; it is unworkable; and it is an unnecessary and excessive burden.

The no-defects clause is simply impossible to comply with on a practical basis. In addition to our concern about the impact of this rule on all of our dealers, we have a number of very serious concerns which will be addressed in greater detail by Tom Greene, next to me, who is the director of legislative affairs for our association.

I particularly thank you for the opportunity to testify before you today and will be happy to provide you with anything you need further in your deliberations.

Thank you.

Senator KASTEN. Mr. Tom Greene.

Mr. GREENE. Thank you, Mr. Chairman. We have a lot of concerns in a short time, so with the Chair's permission, I would like to submit my written statement for the record, and just speak off the cuff on this thing and try to explain exactly what our concerns are.

Senator KASTEN. Without objection, your prepared statement will be made part of the record.

Mr. GREENE. There is no question, I think that Congress has specifically prohibited the Commission from mandating inspection in regard to the sale of a used motor vehicle or prior to the sale of a used motor vehicle; however, we believe and firmly believe that the text of the rule is written in such a manner that the dealer

must, in many cases, inspect the car, in order to comply with the rule; however, the rule is ambiguous, incredibly ambiguous.

But if you look at the rule in its totality, I think you will have to come to the conclusion that in many cases the dealer would have to inspect. The Commission's explanation of what the rule does, as opposed to what is required in the text of the rule, is very different. I do not know whether it is intentional. I suppose it is not. I suppose it is a matter of so many ambiguities being contained in the rule, you can interpret it so many different ways. The Commission has described this one which requires dealers to disclose known defects.

That is a misnomer. This is not descriptive of what the rule actually requires. In fact, the dealer under this rule may be subject to a $10,000 penalty and never even know that a defect exists. Absolutely to have no knowledge that a defect exists.

Let me tell you how this arises in the text of the rule. The rule states that the dealer has knowledge of a defect if he or his employee or his agent has obtained facts or information about the condition of a vehicle which would put a reasonable person on notice. A reasonable person—which would lead a reasonable person under the circumstances to conclude that the car contained one or more of the defects listed in the rule.

There are 52 defects listed in the rule. Once he is on notice that one or more of these defects is likely to exist in the vehicle, the rule goes on to say you have to disclose this particular defect, using the language specified in the text of the rule. In other words, you have to pick one of those defects, one of the 52 defects, and describe that as causing the condition that you have observed.

Now the Commission, I notice in their statement, a part they did not read, I hope we're not going to hear more about the leaning tower, I hope we have put this to rest once and for all. I can understand their concern about that example. It is very graphic and it is very telling, and it is very destructive to their particular theory of the case that no inspection is required.

I won't use that example, I will use another out of many, many that could be cited on a day-to-day basis in the experience of the automobile dealer. An automobile dealer gets the car. He is out driving it and it pulls to one side. Now obviously, something is wrong with the car. He would know it, the consumer would know it, anybody would know it. A car when you drive it is not supposed to pull to one side. He has obtained facts and knowledge, knowledge under the rule which would lead him to conclude that the car contained one or more of the defects listed in the rule; however, among the things listed in the rule that could cause a car to pull to one side—and I will not list them all, but these are among the ones that are listed in the rule, front wheels alined improperly, structural parts damaged, spring broken, shock absorber functioning improperly, twisted frame. It could be any one of these things.

Now there is no way for the dealer to know which of these listed defects is causing this condition, unless he inspects. And unless he is able to identify the specific defect that is causing this condition and disclosing it on the window sticker, he has not complied with the mandates of the rule. This is enforced. This is not just one way of interpreting an ambiguous law. This is enforced by the fact that

the same example that Mr. Cannon put to the Commission, they really could not answer. They said they hope in the next months to be able to work this out.

They included an illustration in their rule which says this. A dealer performs no inspection, but he sees radiator coolant under the car, and in this case, the dealer has knowledge of a defect. That is what the text of the rule says. If he has knowledge of the defect, he has got to disclose it.

There are three or four things that cause radiator coolant to be under the car. There is no way for him to know unless he inspects.

So in fact, the rule taken as a whole, actually requires the dealer to inspect in many cases. This is in clear violation of the congressional limitation put on the Commission. There are many, many more ambiguities contained in the rule. There are defects listed, such as abnormal exhaust discharge, oil leakage, excluding normal leakage.

Now the Commission says that the 30,000 dealers in the United States can determine whether there is excessive discharge out of the tailpipe or normal leakage out of the car, but this is compounded by the fact—not only is this ambiguous, it is compounded by the fact that rule goes on to say when you are determining the normality or abnormality of discharge or of leakage, treat all cars as new cars. If it is an 8-year-old car with 100,000 miles, treat it as a new car in making the determination as to whether a given level of leakage is normal or abnormal.

Now we start running into problems. The mechanic back in the garage does not realize he is supposed to make-believe. When he is looking at this car, he is dealing with the real world. So he does not realize that a given level of leakage on an 8-year-old, 100,000-mile car—that he is supposed to treat this as a new car, and this level of leakage or level of exhaust is abnormal. He does not notify the dealer of what he has observed. In that case, the dealer can be subject to a $10,000 penalty for violation of failing to disclose, when he never knew that the defect existed. He never knew because of the ambiguities that surround the rule.

Another area that has not been mentioned, and it gives us a good deal of concern because of the ambiguities contained in the rule overlay all this, and the rule is incredibly ambiguous, and I do not have time to detail them all. But what the Commission has done is to create another rubic's cube. This time it is in the form of a Federal regulation.

The possible number of interpretations is just absolutely unlimited. It is ambiguity on top of ambiguity.

I notice that my time has expired, and I never got to talk about—and perhaps I can get questions about the contractual obligation that is created under the rule. That has not been discussed at all.

Senator KASTEN. It is not our intention to rush you, but rather to meet time schedules that I understand some of the people on your panel have. If you would like to take an additional 30 seconds and go through the point on contractual obligations, go ahead.

Mr. GREENE. Thank you.

The Federal Trade Commission ends their statement with something that is absolutely a prophesy. They say, if you: "Don't veto

this rule and give this rule its day in court," it is not 1 day in court; it is day, after day, after day in court in order to interpret what the gibberish says. It is poorly drafted.

I would urge the Congress to veto this rule and send a message to the Commission that from this day forward it is to exercise a greater degree of care in structuring public policy and a higher level of competence in drafting this policy into law. This is a terribly ambiguous bill, and in many cases we do not know when we have complied and when we have not complied with this mandate, sir.

Thank you, Mr. Chairman.

[The statement follows:]

STATEMENT OF H. THOMAS GREENE, EXECUTIVE DIRECTOR, LEGISLATIVE AFFAIRS, NATIONAL AUTOMOBILE DEALERS ASSOCIATION

Mr. Chairman and Members of the Subcommittee: My name is Tom Greene and I am the Executive Director of Legislative Affairs for the National Automobile Dealers Association. On behalf of the Association's 20,000 franchised new car and truck dealers I would like to express my appreciation for the invitation to testify before you today on S. Con. Res. 33, which would disapprove the Federal Trade Commission's Rule relating to the sale of used motor vehicles.

This rule, which was issued on August 14, 1981, has, as its genesis, a provision which was included in the "Magnuson-Moss Warranty Federal Trade Commission Improvement Act" which was passed by Congress in December, 1974. In Title I of that Act, which deals exclusively with warranty and warranty disclosure matters, section 109(b) directed the Commission to initiate a "rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles."

In response, the Commission published a proposed rule which included a requirement that sellers of used motor vehicles inspect a number of items or functions of the vehicles and disclose on a window sticker whether each of the listed items were "OK" or "Not OK."

Congress reacted to this proposal by expressing concern that the Commission had not complied with either the law or the legislative history accompanying the law. The basis of their concern was two-fold. First, there was a concern that the requirements of that proposal would create an express warranty under the Uniform Commercial Code, and second, that the proposal would require an inspection of the vehicles. As a result, in the 96th Congress, the House Commerce Committee Report to "The Federal Trade Commission Improvements Act of 1979" expressed concern to the Commission that it was not complying with the Congressional intent in the matter. Additional Views which accompanied that Report, and which were signed by 21 Committee members, elaborated on that concern and gave the following direction to the Commission on this point:

"Congress never intended to give the Commission authority under the provisions of Public Law 93-637 or any other provision of law to require inspections of vehicles or to require that any used motor vehicle or any of its components be warranted."

The companion bill in the Senate contained a provision which specifically prohibited the Commission from issuing a rule which mandated a warranty on or required an inspection of a used motor vehicle prior to its sale. In the House-Senate Conference on this measure the Conferees, obviously not wanting to establish a precedent of placing redundancies into the law, dropped the statutory language of the Senate bill and included the following statement in the Conference Report:

"While the Conferees agreed that the substance of the Senate amendment provided a correct statement of the limitations on the Commission's authority in this area, they believe it is unnecessary to restate existing law."

As a result, the Commission altered its proposed rule and issued a new proposal which it described as granting alternative methods of compliance. One of the alternative methods of compliance would have again mandated a warranty and required an inspection of used vehicles prior to sale.

In a strong reaction to this proposal, 51 United States Senators joined in a letter to the Commission and once again warned the Commission of the limitations on its authority in this area and specifically noted that the Commission could not require an inspection in connection with the sale of a used motor vehicle. The final paragraph of the letter contained the following language:

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"We would like to point out that the Federal Trade Commission Act of 1980 contained a two-house legislative veto provision. If, in the future, the Congress has problems with the final rule, that mechanism may be used."

On August 14, 1981, the Commission issued its final rule in this matter. In addition to requiring dealers to inspect vehicles in many cases in order to comply with its mandates, the rule creates fictions which the dealer is required to engage in, is extremely ambiguous, subjects dealers to tremendous potential liabilities, and displays total lack of wisdom from a public policy point of view. For any one of these reasons, the rule should be disapproved by Congress.

THE KNOWN DEFECT PROVISIONS OF THE RULE REQUIRE DEALERS TO INSPECT IN MANY CASES IN CLEAR CONTRAVENTION OF CONGRESSIONAL DIRECTIVES

At the outset, it should be noted that the dealers are not objecting to the warranty disclosure provisions of the rule or to the provisions dealing with affirmative misrepresentations of the material fact. However, the dealers are extremely concerned with the provisions of the rule which deal with the disclosure of "known" defects. While the Commission describes the dealers' obligation as one which required them to disclose known defects, this is extremely misleading. The defects which the dealer is requried to disclose are not limited to those for which he has actual knowledge but includes those for which he has constructive knowledge as well as those for which he has imputed knowledge.

Section 455.2(c) of the rule states that the dealer has knowledge of a defect if the dealer (or his agent or employee) has "obtained facts or information about the condition of a vehicle which would lead a reasonable person under the circumstances to conclude that the car contained one or more of the defects listed in Section 455.6" of the rule. Section 455.6 of the rule lists 52 potential defects which the dealer has an obligation to disclose if he has reason to believe that one or more exist in the vehicle. In addition, section 455.6 makes it clear that once the dealer has reason to conclude that the car contains one or more of these defects, he must use the language specified in the text of the rule to describe the defect on the window sticker.

Therefore, in many cases the dealer must inspect the vehicle in order to identify the specific defect that is causing the condition that gives him reason to conclude that the vehicle contains one or more of the listed defects. For example, if a dealer or his employee drives a used car that he is offering for sale and notices that the car pulls to one side while he is driving it, he clearly has reason to conclude that the car contains one or more of the defects listed under section 455.6. A car is obviously not supposed to pull to one side while it is being driven. However, he has no way of knowing which of the listed defects is causing this condition unless he inspects it. There are a number of defects listed in the rule which could cause a car to pull to one side. Among them are the following:

(a) Front wheels aligned improperly;
(b) Structural parts bent or damaged;
(c) Spring broken;
(d) Shock absorber functioning improperly;
(e) Bent or twisted frame;
(f) Tire sizes mismatched.

Only an inspection can reveal which of these specific defects is causing this condition, and only by identifying the specific defect can the dealer comply with the disclosure requirements of the rule.

The Commission's own illustrations make it clear that a dealer in a case such as this is clearly on notice that one or more of the listed defects exist and that he must disclose the specific defect on the window sticker. Illustration 5, which is contained in the rule, reads as follows:

"A used car dealer performs no inspections on the cars he/she offers for sale. Nevertheless, the dealer sees a trail of radiator coolant left by a car recently driven onto the dealer's lot for purposes of resale. In this situation, the dealer has knowledge of a defect."

While the illustration leaves no question that a dealer in such a case has knowledge of one or more defects as provided in section 455.2(c) and must disclose the defect causing this condition on the window sticker, the dealer has no idea in many cases which defect to disclose unless he inspects the vehicle. There are several defects listed in the rule which could cause a car to leak radiator coolant. Among them are:

(a) Engine—Cracked block;
(b) Cooling System—leakage, including radiator;
(c) Cooling System—improperly functioning water pump.

The dealer cannot know which of these defects is causing this condition unless he inspects the vehicle, and he cannot comply with the requirements of the rule unless he discloses the specific defect.

There is absolutely no substantive difference between the case of the car which pulls to one side and the case described in Illustration 5, and this illustration makes it clear that the dealer has an obligation to disclose in such a case. The example of the car pulling to one side is not an isolated condition which would put the dealer on notice that the car contained one or more of the listed defects. There are numerous examples that could be cited.

However, in an effort to explain how the rule really does not mean what it clearly says, the Commission has come up with an absolutely incredible position on this point. It is our understanding that the Commission is now saying that in the case of the leaking radiator coolant, the dealer would not have to determine the specific defect that is causing this condition, but could merely list "Cooling System—leakage, including radiator," and thereby comply with the requirements of the rule. This means that the rule, in many cases, can be complied with by listing as a defect something that is not a defect while failing to list a more costly problem (such as a cracked block) that is in fact a defect. This is not only an unbelievable situation, it is a case in which the consumer would be provided with information that is false, deceptive and misleading.

The truth of the matter is that the text of the rule makes it clear that in many situations the dealer would have to inspect the vehicle in order to comply with the rule. This is without question a case in which the Commission has chosen to completely ignore the repeated warnings of the Congress and include in its rule a requirement that it was specifically prohibited from including.

While the rule states that a dealer is not required to inspect to discover defects as was required in earlier proposals, the text of the rule taken as a whole leaves no question that, in many cases, a dealer must inspect in order to identify the specific defect that is causing a condition that he observes in the vehicle. Otherwise, he simply cannot comply with the written requirements of the rule.

THE RULE CONTAINS SO MANY AMBIGUITIES THAT IT IS OFTEN DIFFICULT FOR THE DEALER TO KNOW IF HE HAS ACTUALLY COMPLIED WITH THE RULE

In addition to the difficulties posed by trying to reconcile the Commission's explanation of what the rule requires and what the written text of the rule actually requires, there are a number of provisions and terms contained in the rule that are so vague that the dealer, in many cases, simply cannot know whether or not he has complied with its requirements.

For example, there are included in the list of major defects under section 455.6 a number of terms that are so subjective that it is an absolute certainty that they will be interpreted by different dealers in many different ways. For example, among the defects listed in section 455.6 are such things as "oil leakage excluding normal seepage," "abnormal exhaust discharge," etc. What these terms actually mean is difficult, if not impossible, to determine.

This ambiguity is compounded by another provision of the rule that, in effect, creates a fiction that dealers are required to deal with. Section 455.6 of the rule states that in deciding whether one of the listed defects exists, the dealer should "treat all vehicles the same; do not use lower standards for older or cheaper vehicles." Therefore, in making a determination as to the normality or abnormality of leakage or discharge, the dealer is required to treat an 8-year old vehicle which has been driven over 100,000 miles the same as a new vehicle. This simply does not conform with real world facts. An older used car that has been driven thousands of miles over a number of years is, in fact, different from a new car.

The problem of dealing with these ambiguities and fictions is compounded even further by the fact that the rule states that if an employee or agent of the dealer has "obtained facts or information about the condition of the vehicle which would lead a reasonable person under the circumstances to conclude that the car contained one or more defects" listed in the rule, then the dealer is deemed to have knowledge of the defects even if the employee does not tell the dealer.

If a dealer's mechanic does not realize that he is supposed to engage in "make believe" and treat old cars as if they were new cars, and, consequently, does not view a given level of leakage or discharge as abnormal for an 8-year old high mileage car, the dealer can easily find himself in the position of being subject to a $10,000 fine for failing to disclose a defect.

While all of the ambiguities contained in the rule are too numerous to detail, there is one additional provbision that is so curious it should be noted. Under section 455.6 of the rule there are a number of test procedures set out which are to

be employed to determine if a given system of the car is defective. Since defects in these systems are defined in terms of a failure to pass specific test procedures, a host of questions arise. If the dealer does not perform any of these test procedures, is he held under any circumstances to have knowledge of a defect in a system for which a test procedure is prescribed? If so, in what circumstances? How can a dealer know if a defect exists in one of these systems unless he performs the test procedures, since the defect is defined in terms of a failure to pass the test procedure? If a dealer is required to list these systems as defective in some circumstances even if he does not perform the test procedures and, consequently, does not know if they would fail the test procedures, what is the real function of the test procedures? We honestly do not know the answer to these questions. All we can do is guess.

THE RULE SUBJECTS THE DEALER TO TREMENDOUS POTENTIAL LIABILITIES WHICH ARE IMPOSSIBLE TO CALCULATE BECAUSE OF THE AMBIGUITIES AND UNCERTAINTIES CONTAINED IN THE RULE

As discussed previously, the rule contains so many ambiguities that there will be many cases in which the dealer simply will be at a loss to determine whether or not he has complied with the rule. This in itself results in a situation in which the dealer is subject to extremely high potential liabilities in the form of penalties of up to $10,000 per violation of the rule.

In addition to these potential liabilities however, the rule creates an even greater source of potential liability to the dealer through the imposition of contractual obligations. Section 455.3(b) of the rule provides that "the information on the final version of the window form is incorporated into the contract of sale for each used vehicle you sell to a consumer." On the front page of the form the following statement is written: "MAJOR KNOWN DEFECTS: Dealers must tell you in the space below if they know about certain defects in this car's major system."

It is apparent that the rule creates, by this language, a contractual obligation on the dealer to disclose "known" defects to the consumer in addition to the obligation under the regulation. That being the case, it seems apparent that the pruchaser of a used car could sue the dealer under contract for failing to disclose a "known" defect. If a purchaser of a used car did sue the dealer under contract, it is clear that the rule would be admissible in evidence to establish "knowledge" on the part of the dealer as well as to establish the extent of the dealer's full obligation to disclose.

This is a point which gives the dealers a great deal of concern. Inasmuch as the rule contains a great number of ambiguities regarding the extent of the dealer's obligation to disclose, it is highly probable that different courts will interpret a dealer's obligations under the rule differently from the manner in which the Commission interprets the rule for its enforcement purposes. There are already indications from the Commission that it interprets the rule differently from what the text of the rule actually requires. Certainly, if the rule were admitted into evidence in a breach of contract suit for the purpose of establishing the extent of the dealer's obligation to disclose, the requirements contained in the text of the rule, taken as a whole, would constitute the basis for the Court's decision in the matter. The Commission may choose to enforce the regulation in a totally different manner.

This would put the dealer, who is already in a difficult position of trying to determine how to comply with a rule that is extremely ambiguous, into an absolutely impossible situation. The potential liability on the dealer under these circumstances is not even calculable. Any regulation that has such a level of undeterminable consequences and potentially devastating liabilities has not been very well thought out and should be rejected.

THE RULE IS TOTALLY UNWISE FROM A PUBLIC POLICY POINT OF VIEW AND SHOULD BE DISAPPROVED

As all of the members of this Subcommittee are fully aware, the automobile industry in this nation is in the midst of a deep and severe depression. Domestic sales for 1980 were the lowest since 1963, while domestic production was the lowest since 1961. To date in 1981, sales levels are equally as low and there are some indications that they may slip even lower. As far as the small business dealer is concerned, the attrition rate is staggering. Over 2,500 franchised new car dealers have closed their doors in the past 24 months, and over 125,000 dealer employees have lost their jobs. The experience of the past 24 months for automobile dealers has been devastating, but even more alarming are the prospects for the future if the current economic climate remains unchanged for any appreciable period of time. There are hundreds of small business dealers that are, in effect, hanging on by their fingernails. Many of these dealers are staying in business because of their used car

sales, and would be forced to close their doors if these sales started to falter. It is apparent to us that the Commission's action in this matter demonstrates a total insensitivity to the economy in today's real world and to the plight of the retail automobile dealer.

Currently, used car dealers account for only 50 percent of the sales in the used car market. Yet the Commission has chosen to issue a rule which applies only to dealers and leaves the other 50 percent of the market unregulated. In reality, the Commission has created an artificial competitive disadvantage to the dealer at a time when he is leterally on the brink of disaster.

In summary, the Commission not only ignored the Congressional directives given to it in this matter, it has issued a rule which is inexcusably ambiguous, subjects dealers to an extremely high level of potential liability, and displays a total lack of wisdom in structuring workable public policy.

This rule should be disapproved by Congress for any of these reasons.

We sincerely thank you for hearing this matter and for giving us the opportunity to testify before you today.

Senator KASTEN. Thank you, Mr. Greene.

Mr. Joseph Eikenberg, past president of the National Independent Auto Dealers Association.

Mr. Eikenberg?

Mr. EIKENBERG. Thank you.

My name is Joseph Eikenberg. I am president emeritus of the National Independent Automobile Dealers Association.

Our association was founded in 1946 and is made up of over 7,000 of the largest and oldest used motor vehicle dealers in the country.

Seated next to me is our attorney, Mr. Michael R. Lemov.

It is my intention to submit my prepared testimony and then to summarize it. With your permission, I would like Mr. Lemov to answer a couple of points made by the FTC regarding some statements.

Mr. LEMOV. Thank you.

I will make a very brief comment on the FTC's presentation.

Frankly, I think they should consider issuing a complaint against themselves for deceptive statements—that is, the Federal Trade Commission.

We are very disappointed that they characterized a submission we made way back in 1979 as endorsing this kind of an ambiguous and excessive rule. What we said in 1979 is entirely different, and I just want to clarify for the committee the difference.

At that time, facing a mandatory proposal clearly contrary to congressional intent in passing the Magnuson-Moss Act, we said we could live with a known defects provision which was limited to actual knowledge on the part of the dealer—actual knowledge of defects, not constructive knowledge.

What the FTC puts before you now, the ambiguity of which Mr. Greene so well points out, is a rule that says any information a reasonable man would know indicates a defect must be disclosed. We were talking in 1979, over 2 years ago, about the difference between actual and constructive knowledge. I am certain the committee is well aware of that distinction.

Second, and more important, the proposal that we suggested that they consider in 1979 would not have overridden the State laws of 45 States regarding as-is sales. If you look closely at the example we attached to our petition and comments, which I think you ought to incorporate in the record, Senator Gorton, as well as the 3 pages you put in, the form which we suggested to them for discussion purposes, clearly states that you may bargain for an as-is sale.

That is the existing uniform commercial code provision. Thus, dealers would not have to go through this ambiguous and detailed inspection of known defects.

The difference now is that the FTC offers no option to the consumer, and no option to the public. You must comply with the known-defects provision, regardless of whether or not the as-is sale is a matter of bargaining between the parties.

Those are the 2 basic differences between what we said 2 years ago and what they are saying now. I can assure you that this particular rule was not endorsed by NIADA in any way.

Mr. EIKENBERG. Thank you, sir.

We are pleased to testify on the proposed Federal Trade Commission trade regulation rule concerning the sale of used motor vehicles.

NIADA is opposed to this rule for a broad variety of legal and policy reasons. On behalf of the small businessmen, who constitute the majority of our members, and most of all on behalf of the consumer, we strongly urge the Senate to veto the proposed rule.

The blowup we had made of the proposed law I think is self-explanatory.[1] It shows some of the problem areas that we foresee, and I will make reference to it at a later point.

Mr. Chairman, the members of NIADA have worked hard to improve the marketplace, but problems do arise in the sale of used motor vehicles. Problems and complaints are inevitable in an industry in which over 10 million vehicles are sold each year.

We believe the rule is particularly unwarranted when considered in light of the small percentage of complaints registered each year in relation to the millions of units sold. Testimony at the FTC hearing indicates that the number of complaints registered amounted to one-tenth of 1 percent of the total used cars sold. I think that is a phenomenal record for any industry, and we are proud of it.

Our reasons for opposing the rule are, first, that the known defect disclosure requirement compels dealers to inspect all vehicles they sell or risk liability for substantial Federal and civil penalties. Prior versions of the rule contained mandatory inspection provisions, although the present proposed rule professes not to require vehicle inspection. It is in practical effect compulsory. Dealers will be subject to fine under the Federal Trade Commission Act of up to $10,000 per violation. Dealers also will be exposed to increased litigation by consumers over the issue of knowledge and liability.

For many car dealers the cost of litigation could spell economic disaster. Most dealers will therefore feel compelled to inspect, regardless of any indication that a defect may exist, in order to protect against lawsuits.

Second, the rule would override State law in 44 States regarding as-is sales. Section 455.6 of the rule requires dealers to disclose certain defects that they or their agents or employees know or easily can conclude exist. It requires the alteration of the law of as-is sales as contained in the uniform commercial code as enacted in 44 States and the District of Columbia.

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[1] See p. 72.

And the listing of known defects will imply to the consumer, probably incorrectly, that all other systems are perfect. Such an assumption is always subject to doubt in the case of a complex piece of machinery which is 5 or 10 years old.

The uniform commercial code permits the sale of goods in their existing condition without disclosing any known or suspected defects and without giving any expressed or implied warranties as long as a buyer is notified that the product is being sold as is.

NIADA supports full disclosure to the consumer of the existence of an as-is sale as mandated by the UCC. We support the provision that explains the meaning of as is and which alerts the consumer to bargain for an inspection by the buyer's own mechanic. But the as-is sale serves a useful function to the buyer and the seller. The seller is not required to expend time and resources inspecting goods for defects and repairing them. The buyer, in turn, who may not otherwise be able to afford the product, has the option of purchasing the goods at a lower price, fully aware that some risk exists.

Third, the rule—the proposed rule is contrary to congressional intent and the underlying State law.

The proposed rule runs counter to the intent of Congress as evidenced by the legislative history in the Magnuson-Moss Act. Congress was concerned with the disclosure of the nature and existence of warranties accompanying used car sales, a concept NIADA fully endorses. And the proposed rule would result in increased costs to dealers and increased prices to consumers.

Fourth, evidence submitted to the FTC indicates that the actual cost of inspection may be as much as $100 per car, and the additional cost of the proposed rule may add as much as $250 to the price of a used automobile. This would increase the cost of many older, higher-mileage used cars by more than 25 percent. That increase may place the price of a vehicle beyond the reach of a young adult or family in need of independent transportation.

In addition, most independent used motor vehicle dealers are small businessmen who do not have the facilities necessary to perform the complex and sophisticated testing procedures delineated in the rule. Independent dealers would have to purchase the necessary equipment and hire trained mechanics to perform the inspection or have the vehicle inspected by outside mechanics, thus further driving up the cost of the vehicle.

Personally, sir, I doubt very seriously whether any new car dealer or any legitimate repair shop would want to take the responsibilities of inspecting a car for us and take the possible legal responsibilities if something happened afterwards.

Fifth, the rule serves to lessen competition. The greatest price increases caused by the rule will probably occur in the lower-priced, higher-mileage vehicles. Testimony before the FTC demonstrates that independent dealers generally rely on the sale of older, less-expensive vehicles for the bulk of their sales. Increased prices and exposure to civil penalties for defects in such vehicles will make their sale unprofitable and impractical. Older cars will be forced out of the dealer regulated market into the unregulated private market which already constitutes at least 50 percent of all used car sales.

Independent dealers will suffer competitively in newer used vehicle markets at the hands of franchised dealers who have the equipment and facilities to perform necessary inspections. And they have greater credit capability than the independents.

The first casualty of the anticompetitive results will be independent dealers, many of whom may be driven out of business. But the real victim of the lessening competition will be used car buyers. Ultimately they will pay more.

In conclusion, sir, the used motor vehicle industry is highly competitive with franchised dealers who sell newer, higher-priced vehicles and hold a larger share of the market in comparison to the independent competition. The figures demonstrate that the dealers share of the used car market has been decreasing in recent years as the private seller market has increased. Private sellers now sell more used vehicles than dealers, and the independent motor vehicle dealers are in a particularly precarious position with only an estimated 18 percent of the market.

The members of NIADA care about our industry and our customers. With the ever increasing price of new cars, the used car industry has become more important to this country. We will continue to stand behind our responsibility to the public. We will encourage and support full disclosure to the consumer of warranties which accompany the sale of used cars, and we will continue to support enforcement of existing legislation which prohibits sellers from affirmatively misrepresenting the condition of the products they sell.

We cannot, however, support the proposed FTC used car trade regulation rule. It represents an unnecessary intrusion into the free market and could mean serious economic difficulties for much of the independent used car industry and the consumers our industry serves.

We strongly urge the Senate to veto the proposed FTC used car rule.

I thank you, sir. I am sorry I took a couple of seconds extra, and I will be glad to answer any questions.

[The statement follows:]

STATEMENT OF JOSEPH EIKENBERG, PRESIDENT EMERITUS NATIONAL INDEPENDENT AUTOMOBILE DEALERS ASSOCIATION

Mr. Chairman: My name is Joseph Eikenberg. I am President Emeritus of the National Independent Automobile Dealers Association. Accompanying me today is Mr. Dan Ray, Executive Director of NIADA. NIADA was founded in 1946 and includes within its membership more than 7,000 of the largest and oldest used motor vehicle dealers in the country. The average NIADA dealer is a small businessman with more than 15 years experience in the business.

As for myself, I have been in the automobile business for 34 years and have owned my own business for 28 of those years. I have served as President of my Chamber of Commerce and was a Director of the Better Business Bureau of Baltimore for 10 years.

We are pleased to testify on the proposed Federal Trade Commission Trade Regulation Rule concerning the sale of used motor vehicles. NIADA is opposed to this rule for a broad variety of legal and policy reasons. On behalf of the small businessmen who constitute the majority of our members and, most of all, on behalf of the consumer, we strongly urge the Senate to veto this proposed rule.

NIADA's purpose is to preserve and improve the used motor vehicle industry. We attempt to assure the consumer a good product at a fair price. To promote this goal, all NIADA members subscribe to a Code of Ethics which mandates members to use only truth and accuracy in advertising and selling, and to stand behind any guaran-

tee given with the sale of a motor vehicle. Moreover, we have worked closely with attorneys general in many states to eliminate unfair practices by dealers who fail to observe the industry Code of Ethics. NIADA is also active in several states sponsoring and supporting consumer action panels which serve to mediate and resolve consumer complaints regarding new and used cars.

Mr. Chairman, it is true that problems arise in the sale of used motor vehicles. Problems and complaints are inevitable in an industry in which over ten million vehicles are sold each year. In this regard, NIADA can support a reasonable FTC rule which requires notification to the consumer of any warranty that accompanies a sale and full disclosure of the nature and extend of the applicable warranty. However, we are strongly opposed to the massive federal intervention into the industry and the rewriting of state law which implementation of this proposed trade regulation rule would entail. We believe this rule is particularly unwaranted when considered in light of the small percentage of complaints registered each year in relation to the millions of units sold. Testimony at the FTC hearings indicated that the number of complaints registered amounted to one-tenth of one percent of total used car sales.[1]

Our reasons for opposing the rule are as follows:

1. THE "KNOWN DEFECT" DISCLOSURE REQUIREMENT COMPELS DEALERS TO INSPECT ALL VEHICLES THEY SELL OR RISK LIABILITY FOR SUBSTANTIAL FEDERAL AND CIVIL PENALTIES

Prior versions of this rule contained mandatory inspection provisions. Although the present proposed rule professes not to require vehicle inspection, it is, in practical effect, compulsory. Dealers will be subject to fines under the Federal Trade Commission Act, of up to $10,000 per violation, if they fail to disclose "known defects" that they, their agents, or employees know to exist or reasonably should know to exist based on facts or information they have about the condition of the vehicle. Moreover, dealers will be exposed to increased litigation by consumers over the issue of "knowledge". For many car dealers, the costs of litigation alone could spell economic disaster. Most dealers will therefore feel compelled to inspect regardless of any indications that a defect may exist in order to protect themselves against lawsuits and claims.

2. THE RULE WOULD OVERRIDE STATE LAWS IN 44 STATES REGARDING "AS IS" SALES

Section 455.6 of the rule requires dealers to disclose certain defects that they or their agents or employees know or reasonably should conclude exist in the vehicle's major systems. This requirement alters the law of "as is" sales as contained in the Uniform Commercial Code and enacted by forty-four states and the District of Columbia. Furthermore, the listing of "known defects" will imply to the consumer—probably incorrectly—that all other systems are perfect. Such an assumption is always subject to doubt in the case of a complex piece of machinery which may be 5 or 10 years old.

The Uniform Commercial Code permits the sale of goods in their existing condition, without disclosing any known or suspected defects and without giving any express or implied warranties, as long as the buyer is notified that the product is being sold "as is". NIADA supports full disclosure to the consumer of the existence of an "as is" sale as mandated by the U.C.C. We support the provisions of the proposed rule which explain to the consumer the meaning of "as is" and which alert the consumer to bargain for an inspection by the buyer's own mechanic.

However, the "as is" sale serves a useful function to both buyer and seller. The seller is not required to expend time and resources inspecting goods for defects and repairing them. The buyer in turn, who may not otherwise be able to afford the product, has the option of purchasing the goods at lower prices fully aware that some risk may be involved. The ability of the market place to act in such fashion is a pillar upon which our free enterprise system is based and has been part of our common law for centuries.

Under the proposed rule, a seller would no longer be able to sell a vehicle without disclosing certain defects, which, as we shall discuss, are equally as ill-defined as is the standard of "knowledge" to be applied. By compelling such disclosure, the proposed rule overrides the provisions of state "as is" laws.

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[1] Numerous witnesses attested to the small percentage of complaints registered. Their testimony may be found in the transcript of the FTC hearings at pages 1651, 1658, 3077-80, 3168-69, 3172 and 3194.

3. THE PROPOSED RULE IS CONTRARY TO CONGRESSIONAL INTENT

In addition to undermining state law, the proposed rule clearly runs counter to the intent of Congress as evidenced by the legislative history of the Magnuson-Moss Act. Congress was concerned with disclosure of the nature and existence of warranties accompanying used car sales, a concept NIADA fully endorses. Few provisions of the Magnuson-Moss Act overrule state law. The Act was carefully crafted to build a federal system of warranty disclosure and remedies on existing state law, not to overrule it. There is no indication in the legislative history that Congress contemplated the FTC amending state law on so fundamental an issue. Moreover, there is no evidence in the agency proceedings warranting such a drastic change in state law.

We do not believe Congress ever intended to authorize the FTC to abolish provisions of the U.C.C. which have deep roots in the history of this country. We do believe that state "as is" law should be left undisturbed except for disclosure requirements and that the free market system should be allowed to function unhindered by restrictive regulations. Elimination of "as is" sales can only lead to increases in the cost of used motor vehicles which in turn will work to the detriment of both seller and consumer.

4. THE PROPOSED RULE WOULD RESULT IN INCREASED COSTS TO DEALERS AND INCREASED PRICES TO CONSUMERS

Evidence submitted to the FTC indicates that the actual cost of inspections may be as much as $100 per car, and that additional costs of the proposed rule may add as much as $250 to the price of a used automobile.[2] This would increase the cost of many older, higher mileage used cars by more than 25 percent. That increase may very well place the price of a vehicle beyond the reach of the young adult or family in need of independent transportation.

In addition, most independent used motor vehicle dealers are small businessmen who do not have the facilities necessary to perform the complex and sophisticated testing procedures delineated in the rule. The independent dealers would either have to purchase the necessary equipment and hire trained mechanics to perform the inspections, or have their vehicles inspected by outside mechanics, thus further driving up the cost of vehicles. The added costs of the rule could easily increase total consumer costs by as much as $1 billion annually.

5. THE RULE WILL SERVE TO LESSEN COMPETITION

The greatest price increases caused by the rule will probably occur in lower priced, higher mileage vehicles. Testimony before the FTC demonstrated that independent dealers generally rely on the sale of older, less expensive vehicles for the bulk of their sales. Increased prices and exposure to civil penalties for defects in such vehicles will make their sale unprofitable and impractical. Older cars will be forced out of the regulated dealer market and into the unregulated private market which already constitutes at least 50 percent of all used car sales. It will not be possible for independent dealers to compete with private sellers, the prices of whose vehicles will not have to reflect regulatory compliance costs. Thus, the independent dealer will lose an important segment of his current business. But, the public will have less protection in the unregulated private market.

Independent dealers will also suffer competitively in the newer used vehicle market at the hands of franchised dealers who, generally, have the equipment and facilities to perform necessary inspections, and who have greater credit capability than independent dealers.

The ultimate effect of the known defects provision of the rule will be a severe lessening of competition in the used motor vehicle industry. The first casualities of this anticompetitive result will be independent dealers, many of whom may be driven out of business. But the real victims of lessened competition will be used car buyers. Ultimately they will pay much more for their automobiles.

6. THE RULE LEAVES UNDEFINED AND AMBIGUOUS THE ISSUE OF DEALER LIABILITY

The "major known defects standards" listed in section 455.6 of the rule are so vague and ambiguous that they provide inadequate notification to the dealers regarding what defects must be disclosed and what exactly constitutes "knowledge."

Included among the defects requiring dealer disclosure under the rule are the following examples:

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[2] See transcript of FTC hearing at pages 1151-52, 1675, 3031 and 4169.

Engine

Oil leakage, excluding *normal* seepage.
Abnormal exhaust discharge.

Transmission and drive shaft

Improper fluid level or leakage excluding *normal* seepage.
Abnormal noise or vibration caused by *faulty* transmission or drive shaft.

Differential

Improper fluid level or leakage, excluding *normal* seepage.
Abnormal noise or vibration caused by *faulty* differential. (emphasis added).

Nowhere in the rule is "abnormal" noise/vibration/or exhaust defined, nor is "normal" seepage defined. Moreover, the rule fails to take into account the practical realities. No adjustment is made for the age of the vehicle. Thus, for example, to determine what is an "abnormal" noise or seepage in an eight year old car, the dealer must compare it to what is "normal" or "abnormal" in a car that is one year old.

In essence, the dealer is left with the option of either guessing at the meaning of the rule and thereby risking sanctions, or performing costly inspections to protect himself from substantial liability. The impracticality of these "standards" is obvious. Their vagueness and ambiguity will invite further regulatory intrusion into the marketplace and be the cause of continued litigation over the issue.

7. THE CURRENT ECONOMIC CONDITIONS OF RECESSION, INFLATION AND HIGH INTEREST RATES MAKE IMPLEMENTATION OF THE PROPOSED RULE AT THE PRESENT TIME PARTICULARLY ONEROUS TO THE USED CAR INDUSTRY

The record upon which the FTC based its findings was compiled commencing in 1973. Hearings were held in 1976 and 1977. The factual basis of the proposed rule is thus outdated and fails to take into account the drastic changes over the past few years in the economy generally, and the auto industry in particular.

After the record for the proposed rule was closed, the used automobile industry and the nation entered a period of economic decline. The used car industry has been particularly hard hit by the current economic downturn. Interest rates for the average independent dealer for inventory financing excede 20 percent, if financing is available at all. SBA figures indicate that bankruptcies of small businesses have risen substantially over the last two years. In the used car industry, we are sad to report, the deteriorating economic environment is responsible for a decrease of almost 15 percent in our membership over the past year and one half.

When viewed in light of the current economic situation, the inappropriateness of this proposed rule is magnified. The increased cost it will impose on independent used car dealers can only serve to accelerate inflation and increase the number of failing businesses.

CONCLUSION

Mr. Chairman, the used motor vehicle industry is highly competitive. It is dominated by franchised dealers who sell newer, higher priced vehicles in comparison to their independent competition. Industry figures demonstrate that the dealer's share of the used automobile market has been decreasing in recent years as the private seller's market has increased. Private sellers now sell more used vehicles than dealers. Thus, independent motor vehicle dealer's are in a particularly precarious position, with only an estimated 18 percent of the market.

The members of NIADA care deeply about our industry and our customers. With the ever-increasing price of new cars, the used car industry has become more important to this country. We will continue to stand behind our responsibility to the public. We will encourage and support full disclosure to the consumer of warranties which may accompany the sale of used cars. We will continue to support legislation which prohibits sellers from misrepresenting the condition of the products they sell. We will also continue to work with the states and consumer groups to police out industry and enforce our Code of Ethics.

We cannot, however, support the proposed FTC used car trade regulation rule. It represents an unnecessary intrusion into the free market and could mean serious economic difficulties for much of the independent used car industry and the consumers our industry serves.

We strongly urge the Senate to veto the proposed FTC used car rule. We thank the Chairman and the Committee for this opportunity to present our views. We would be pleased to answer any questions the Committee may have.

USED CAR BUYERS GUIDE

SUGGESTS DEALER DISHONESTY

IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing. Keep this form.

NOTICE: For your protection and safety

Ask about the current condition of the following major mechanical and safety systems of this car. See below which of these systems, if any, are covered by a warranty and which systems are known by the dealer to contain major defects. Dealers must inform you in writing if they know of certain defects in this car's major systems.

IMPLIES DEALERS DO NOT DISCLOSE FACTS

WHAT IS A MAJOR DEFECT?

WHAT ARE CERTAIN DEFECTS?

LAW SUIT SHOPPING LIST?

Frame & Body	Brake System
Engine	Steering System
Transmission and Drive Shaft	Suspension System
Differential	Tires
Cooling System	Wheels
Electrical System	Exhaust System
Fuel System	Accessories*

PRE PURCHASE INSPECTION. Ask the dealer if you may have this car inspected by your mechanic either on or off the lot.

WARRANTIES FOR THIS CAR:

STATE LAW AND U.C.C. IN 44 STATES OVER-RIDDEN BY KNOWN DEFECTS REQUIREMENTS

THIS SECTION CANCELLED BY KNOWN DEFECTS REQUIREMENTS

NO IMPLIED WARRANTY. "AS IS." This means you will pay all costs for any repairs needed when you buy the car or after the time of sale. If this box is checked, the dealer makes no written promises about this car's condition.

FULL LIMITED WARRANTY. The dealer will pay % of the total repair bill for covered systems that fail during the warranty. Ask the dealer for a copy of the warranty document for a full explanation of warranty coverage, exclusions, and the dealer's repair obligations. Under state law, "implied warranties" may give you even more rights.

SYSTEMS COVERED DURATION

SERVICE CONTRACT. A service contract is available from for $ extra. This service contract adds to the dealer's responsibilities under any warranty. If you buy a service contract within 90 days of the time of sale, state law "implied warranties" may give you additional rights.

WHAT ARE MAJOR DEFECTS?

PROMOTES LITIGATION OVER DEALER KNOWLEDGE IN STATE AND FEDERAL COURTS.

MAJOR KNOWN DEFECTS. Dealers must tell you in the space below if they know about certain defects in this car's major systems. The defects that must be disclosed if known are listed on the back of this form. However, there may be defects that are unknown to the dealer. If nothing is listed, the car is not necessarily free of defects.

CREATES PRESUMPTION THAT VEHICLE HAS DEFECTS

IF NOT KNOWN, MUST DEALER INSPECT FOR SELF-PROTECTION?

See the back of this form for important additional major defect information.

Below is a list of some major defects that may occur in used cars.

Frame & Body
Frame-cracks, corrective welds, or rusted through
Doortracks—bent or twisted frame

Engine
Oil leakage excluding normal seepage
Cracked block or head
Belts missing or inoperable
Knocks or misses related to camshaft lifters and push rods
Abnormal exhaust discharge

Transmission & Drive Shaft
Improper fluid level or leakage excluding normal seepage
Cracked or damaged case which is visible
Abnormal noise or vibration caused by faulty transmission or drive shaft
Improper shifting or functioning in any gear
Manual clutch slips or chatters

Differential
Improper fluid level or leakage excluding normal seepage
Cracked or damaged housing which is visible
Abnormal noise or vibration caused by faulty differential

Cooling System
Leakage including radiator
Improperly functioning water pump

Electrical System
Battery leakage
Improperly functioning alternator generator battery or starter

Fuel System
Visible leakage

Inoperable Accessories
Gauges or warning devices
Air conditioner
Heater & Defroster

Brake System
Failure warning light broken
Pedal not firm under pressure (DOT specs)
Not enough pedal reserve (DOT specs)
Does not stop vehicle in straight line (DOT specs)
Hoses damaged
Drum or rotor too thin (Mfgr. specs.)
Lining or pad thickness less than 1/32 inch
Power unit not operating or leaking
Structural or mechanical parts damaged

Steering System
Too much free play at steering wheel (DOT specs)
Free play in linkage more than 1/4 inch
Steering gear binds or jams
Front wheels aligned improperly (DOT specs)
Power unit belts cracked or slipping
Power unit fluid level improper

Suspension System
Ball joint seals damaged
Structural parts bent or damaged
Stabilizer bar disconnected
Spring broken
Shock absorber mounting loose
Rubber bushings damaged or missing
Radius rod damaged or missing
Shock absorber leaking or functioning improperly

Tires
Tread depth less than 2/32 inch
Sizes mismatched
Visible damage

Wheels
Visible cracks, damage or repairs
Mounting bolts loose or missing

Exhaust System
Leakage

IMPORTANT: The information on this form is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purpose of test driving) is a violation of federal law (15 C.F.R. 455).

Defect disclosure specifications are printed in Volume 16 C.F.R. (Code of Federal Regulations) Part 455.

BILLING CODE 6750-01-C

WHAT IS NORMAL?

WHAT IS NORMAL?

WHAT IS ABNORMAL?

WHAT IS IMPROPER?

WHEN DOES IT BECOME ABNORMAL?

WHAT IS IMPROPER?

DETAILED INSPECTION REQUIREMENTS IN CODE OF FEDERAL REGULATIONS

WHAT IS IMPROPER?

WHAT IS IMPROPER?

[VAGUENESS WILL PROMOTE LITIGATION]

[AMBIGUITY WILL CAUSE UNNECESSARY BUYER COMPLAINTS]

[CIVIL PENALTIES OF UP TO $10,000 FOR EACH VIOLATION!]

Senator KASTEN. Thank you, Mr. Eikenberg.

Senator Cannon?

Senator CANNON. The Magnuson-Moss Act, which became law in 1975, required warranty disclosure. Does NIADA support that part of the rule?

Mr. EIKENBERG. Yes, sir, we do.

Senator CANNON. Mr. Greene, let me ask you, do you believe the average dealer member of your association or his mechanic would be able to compare old and new vehicles on the same standard in making a determination as to the normality of the car?

Mr. GREENE. No; you obviously can't. It is not a matter of belief.

An old car, an 8,000- to 10,000-mile, 8-year-old car is an absolutely different car from a new car. The thousands of times that it is started up and cooled down and the contraction and expansion and the bumps and everything that takes place over that long a period makes it a different car.

I do not know that much about the mechanics of cars, and I went out and discussed it when the rule came out. On August 14, I went out around the metropolitan area. I talked with some mechanics. This is one particular point I brought up.

They were baffled. They were absolutely baffled. They didn't know how you could comply, how you'd treat an 8-year-old car. As a matter of fact, one raised the hood. He showed me oil on the motor. It was about a 6-year-old car that had leaked out and seeped out. He said, "If this was a new car, you ought to get to your dealer right quick and get the warranty done. There is, obviously, a defective seal on the car." On an 8-year-old car, this is not unusual; this is not abnormal.

So, they really created a fiction that you cannot—it does not comply with the real world. It creates an ambiguity that will put a dealer in a position of having to pay a $10,000 penalty, and he really never knew what he was required to comply with in the first place.

Senator CANNON. In the example that you give on the car that, obviously, had a defect and the example of mine that you used, a dealer would presumably have to make an inspection to determine what was wrong there, would he not?

Mr. GREENE. There is no way he could know——

Senator CANNON. If he made that inspection, if his mechanic made that inspection and discovered something else that the mechanic did not tell him or did not point out, wouldn't he be liable under that provision of the act? In other words, the disclosure of the known defect would seem to create an implied warranty that nothing else was wrong.

Would that seem to reasonably follow?

Mr. GREENE. The liability would arise in the case that you describe, not from implied warranty but from the fact that the dealer's employee had knowledge of a defect that he did not tell the dealer about. Consequently, the dealer did not disclose it on the window form. And under the terms of the text of the rule, provision of the text of the rule, there is absolutely no question; he would be liable.

Senator CANNON. You don't think the implied warranty issue is necessarily a problem, then?

Mr. GREENE. I'm not sure whether it is a problem or not, to tell you the honest truth. I don't know if it's a problem.

Senator CANNON. You might review Senator Heflin's testimony. I quoted from part of it.

He seems to have a concern about whether one makes an inspection and finds a defect and discloses that defect, if there is not, in fact, an implied warranty then that there are no other defects existing. The inspection would have had to have been made to find and locate that known defect and disclose it.

Mr. GREENE. Implied warranties are not even necessarily statutory in nature. In many cases it is a judicial law that establishes the body of law relating to implied warranties. I do not know the instinct. I do not know what the 50 States would do with this. Perhaps this is addressed in the uniform commercial code. I am not that familiar with implied warranties. He may have it documented; I'm not sure.

Senator CANNON. Thank you, Mr. Chairman.

Senator KASTEN. Senator Gorton?

Senator GORTON. You used the hypothetical example of a pulling car in your earlier testimony to make your point regarding the necessity of inspections under the rule. You testified that this problem might have been caused by any one of six major defects which would have to be disclosed if they were known, pursuant to this disclosure form: Front wheels alined improperly; structural parts bent or damaged; spring broken; shock absorber misfunction, et cetera.

Now, let's assume that one of your member dealers has not one, but two pulling cars, with essentially the same mileage, the same make, model, and year. One is pulling, in fact, because of mismatched tires or improper alinement, the other because of a bent frame. Assuming everything else is equal, those two cars are of considerably different value, are they not?

Mr. GREENE. No question.

Senator GORTON. Now, you acquired those cars in some manner or another. Either you took them in trade or you purchased them from some other dealer or through an auction. Isn't your dealer going to make that determination as to which of those six defects is there before he takes the car into his own stock?

Mr. GREENE. Not necessarily, no. It is not—despite what the Federal Trade Commission said, and despite, I think, your own statement of your experience in the State of Washington, a lot of dealers just do not have the facilities or the time, or want to bear the cost at $35 or $40 an hour now for a mechanic, to put it up and go through an extensive—they will take a guess and take a chance. It is worth more to them to do that, in certain cases, than it is to expend $40 or more an hour for a trained mechanic. They get scalded sometimes. They are getting these cars, essentially, from a consumer. A consumer drove the car. This consumer sold him the car. The defects usually exist at that point.

I'm not going to assert that it is a real problem on an everyday basis, but consumers mask defects also because otherwise, they are depreciating the cost of what they are giving to the dealer, and they mask them well many times. The car may be on the lot for—not in today's market so much because today's market is good for

used cars. But it may be on for several months. Several people may drive the car. A lot of things can happen to it in that interim period between the time he purchases the car and the time that he sells the car. No; not in every case. Certainly, not in every case.

Senator GORTON. But I come back to the fact that you used a pulling car as an example. Now, that, presumably, is an observable defect in the car. We just do not know what the cause of it is.

Mr. GREENE. Right.

Senator GORTON. But the difference in one or the other of these six causes may result in a $200 to $500, maybe $1,000 difference in the value of the car. You're saying that under most circumstances your dealer, in taking that in and setting up a trade price for it, is not going to attempt to find out what the reason is that that car is pulling?

Mr. GREENE. Not in most circumstances. In the greater number of cases—and he may well take that chance, but this is not an isolated case. But for purposes of complying with the text of this Federal Trade Commission rule, he cannot take the chance. If he is wrong and takes the chance and he sells to a customer and he has to come back in and replace the car, or do some corrections on the car, it may cost $100 or $200, and if he is wrong with the Federal Trade Commission it is $10,000.

Senator GORTON. In these same two hypotheticals, while each of those defects might impact on the safety of the car, some of them would have a much greater impact on the safety of the car than others, would they not? In some cases you might have a very unsafe car.

Mr. GREENE. No question.

Senator GORTON. Doesn't it follow that dealers of quality who join an association like yours, who are both scrupulous and prudent in their business practices, who are considering taking up such a car are going to determine the cause of that problem? Is it your thrust that you think it is a wise business practice to ignore it, to take a guess at it? And second, when there is something which might suggest that a serious safety defect exists in a car, do you say that normal business practice may very well be just simply to ignore it, to make no inspection for it whatsoever, and to sell it to a consumer, even though it may be very, very unsafe?

Mr. GREENE. No; the 52 defects listed there are not all—or by any means are not even representative of safety-related defects. Most States have inspections, have safety-related inspections, and they identify safety-related systems. In those cases the dealer must, under State law, make that inspection and put the sticker on before he can sell the vehicle. We're talking about many, many defects that are listed there that are not safety related, that may not get an inspection because they do not want to—might not even have the facilities. I cannot talk for the independents, but certainly the new car dealers would have facilities. But in many cases, they do not go through a detailed inspection of the car. It would cost them more than the profit margin, in some cases.

No; they don't. They take a chance, in many cases, just like the consumer does. They get it from the consumers. The pool of cars—only-one half of them are as good as regulated under this rule. No; they did address that. The reasons for that are a little vague to me,

too. It only relates to one-half of the market. There are cases in which you don't go through a detailed inspection in order to specifically identify one of these 52 defects in the vehicle.

Senator GORTON. Do you feel that the free market system is better served when the seller has a great deal more knowledge about the condition of the item being sold than the consumer does?

Mr. GREENE. It depends. In this particular case where you're only regulating one-half of the market and not the other half of the market, is that the free market? I don't know, in that case, what the answer to that is. Is it best served by regulating one-half of the market and not the other half of the market? Or does that create an artificial competitive disadvantage to those regulated as opposed to those who aren't regulated?

Senator GORTON. I think my question was fairly simple. You do not have an answer to it?

Mr. GREENE. I do not see it as simple; no. It is not that I don't have an answer. I really do not see the question as being that simple. I suppose you're talking about the market as being the total market.

Senator GORTON. Your member knows that a car has a defect. Is the free market better served if he discloses that defect to his purchaser or not?

Mr. GREENE. If he knows. If he has actual knowledge and is not undertaken with a potential liability, yes. If he has actual knowledge of a defect. But this is not what this rule requires.

Mr. EIKENBERG. Can I comment on that, please, sir?

Senator GORTON. Go ahead.

Mr. EIKENBERG. From the industry in a practical standpoint, sir, I think there are a couple of things that you should make clear about what you are asking. First: I think there is a different situation that we have to take into consideration. This form says at the top, do not accept oral promises. The very next line says ask your dealer about these 16 points. Now, the customer assumes that this is part of his contract. If he asks me about those 16 points and I list nothing under the major defect section, I feel that he is entitled to assume that I told him there was nothing wrong with this.

Now, I feel that is an implied warranty. I feel it is probably an expressed warranty on my part to that consumer, if I do not list the major defect section with something special. Now, as a practical point, when we drive a car, any of our competitors here buy a car, if they know something is wrong with it and they are not going to sell the car as is, they will try to repair that factor before they put it on the street. It is so much cheaper to do it before you sell it, than to sell it and do it afterward, if you know it. Our problem here is when will we know what is knowledge, what is a major defect, what is abnormal and what is normal?

Now, to find that out and to be safe and to be on the right side, we are going to have to inspect that vehicle in great detail, and then have absolutely no assurance that tomorrow something else won't happen to that car that could be considered a major defect. It is just unworkable in a practical basis.

Senator GORTON. Each of those points was covered in the form that you submitted yourself a couple of years ago when you objected to something else.

Thank you, Mr. Chairman.

Senator KASTEN. Senator Danforth?

Senator DANFORTH. I want to ask this of Mr. Miller or Mr. Greene. Is the Missouri Automobile Dealers Association a member of the National Automobile Dealers Association?

Mr. MILLER. Yes, Senator, they are. Not as an association, but the dealers of Missouri, their members, most of them are members of NADA, but not the association itself.

Senator DANFORTH. Senator Gorton and I were both State attorneys general. In my office we worked very closely with the Automobile Dealers Association. It was my view at the time that the Missouri Automobile Dealers Association was one of the best trade associations in the State and one of the most cooperative in matters of consumer protection.

Having said that, I have to say that the testimony that I have heard from this panel is not consistent with my experience with the association. I think for you to say that there is a duty to inspect when the rule plainly says you are not required to inspect, is just a totally unreasonable interpretation of the rule. I further think that it is not consistent with the standards of the Missouri Automobile Dealers Association as I have dealt with them, to take the position that if a dealer knows of a defect, that he does not have to disclose it. And this rule does not require inspection. It expressly says that it does not require inspection. It has been said this morning in describing it that it does not require inspection. It cannot reasonably be argued that it does require inspection.

Mr. MILLER. Again, Senator, let me comment briefly. I will not comment on the Missouri Association, because it is a fine one, and there are 87 State and major city associations in the country, representing—and their members, there are 20,000 members. They are fine, but there are many fine associations. Mine and New York State Auto Dealers is that type of an association.

I would comment on your remark in this way: The Senator mentioned a minute ago about a prudent, responsible businessman, which he indicated most dealers, small businessmen are. I would say that that prudent, responsible businessman today would not be prudent and not be responsible if he did not inspect the automobiles to comply with the provisions of this regulation. It would just make a matter of good business sense to me, and every single dealer in the United States I have talked to plans to inspect, to protect himself.

One of the major problems today is potential lawsuits and litigation involving any type of litigation, rule, law, or otherwise. I just cannot conceive of a responsible, prudent businessman today that would not automatically inspect cars to protect himself against potential future lawsuits as a result of this rule.

Senator DANFORTH. Not as a result of this rule. If you check no implied warranty, if you check the box that says no implied warranty under major known defects, if you do not know of any, you say none.

Mr. MILLER. There have been many examples, several of the people testifying, as to what the potential possibilities and the ambiguities are. If they do not point that out, then I certainly have no argument in addition to those potential situations outlined that would add to that. But they should certainly indicate to you that if you were a responsible, prudent small business man, that you, believe me, would protect yourself against the potential lawsuits that could arise out of any action as a result of ambiguous violations of this rule.

Senator DANFORTH. I would think that known defects, together with the express statement that you were not required to inspect, means that what you are required to do is to disclose defects that you know, and it is just as simple as that.

Mr. GREENE. Can I address that?

Senator KASTEN. Let's let—Mr. Eikenberg has been trying to get in for the last couple of seconds, and then we will go to Mr. Greene.

Mr. EIKENBERG. Thank you.

Mr. LEMOV. Just a brief comment on Senator Danforth's point. This association has never said it opposes the disclosure rule. I cannot speak for other dealers, but I can speak for NIADA, and they have, from the beginning, said that disclosure is the way to arm the consumer. The problem—and to make for equal bargaining situations. The problem is this rule is so vague, so open-ended in terms of liability, potential liability, that it will increase the cost of cars to the consumer whom the Federal Trade Commission seeks tc protect.

The key to this thing, to that statement, is the form you just read us. Senator Danforth, in most States a dealer can sell a car as is without any implied or express warranties, if he informs the consumer of that fact. And in fact, it is NIADA's position that that should be made very clear and the as is sale should be well defined so the parties can agree on that kind of sale.

The problem with this FTC form is with the paragraph entitled major known defects. Even if you check as is, no implied warranty, you are still mandated, under the rule, to complete the major known defects section which is not defined. What does a reasonble man know under the circumstances? Which dealer is the reasonable man you model yourself on? Which of the 52 protocols must you utlize?

Therefore, to be safe, to be prudent, every dealer must inspect. The price goes up and the consumer suffers. That is the problem with the rule, its workability, its vagueness.

Senator DANFORTH. I just will say, I think that is an unreasonable interpretation of the plain language of the rule.

Mr. GREENE. May I address that just a second, Senator?

Senator KASTEN. Mr. Greene?

Mr. GREENE. The rule is not an unreasonable interpretation of the rule. I can point out to you, and I would like to, to sit down and show you exactly what the various provisions of the rule actually say. As a matter of fact, the Federal Trade Commission does not think it is an unreasonable interpretation of the rule because their own illustration in which it says a dealer has defects in the coolant situation, and it could be any of three defects, they say they have

to work that one out over the next 6 months, that in fact that is an ambiguity that could easily be interpreted as requiring an inspection of the rule.

It is not an unreasonable argument. It is not an unreasonable argument at all. In addition, under this rule and because of this rule, the sticker now becomes a part of the sales contract of the sale of the car, and therefore there is not only a regulatory obligation to inspect what they describe as no defects; there is a contractual obligation now. Contractual cases are going to be brought up in hundreds and perhaps thousands of small courts throughout the United States that do not even have written opinions. If a plaintiff sues a defendant on the basis that he did not include a known defect, the rule will be admitted into evidence in order to determine the extent of his obligation. If there is ambiguity contained in the rule, it is an absolute certainty that different courts are going to interpret the obligation of the dealer in different ways. And if that is the case, he is in an impossible situation. FTC is interpreting the obligations in one way. The courts, small claims courts and other courts throughout the localities and States of the United States, can easily be interpreting them another way.

This points out the contractual obligation was never really brought up, and I do not know——

Senator DANFORTH. I don't want to prolong this because other people, I am speaking on other people's time. But take this business about leaky coolant. Now, if you turn to the back here, it lists major defects. Cooling system, leakage, including radiator. What I would do if I were a dealer and I knew that the coolant was leaking, I would say "leaking coolant".

Is that difficult if you know that the coolant is leaking, to say that the coolant is leaking?

Mr. GREENE. Yes, yes. You cannot do that. You have to—that was my point. You have to use the specific language that they use in this list of defects. If you were to list the defect that you described, you have to put "cooling system, leakage, including radiator." Now, if you put that down, and it is a cracked block that is causing the leakage, and you say you can comply with the rule by this method, what this means is that the rule in many cases can be complied with by listing as a defect something that is not a defect, while failing to list something that is a more serious problem, such as a cracked block that is, in fact, a defect. That is not a way you can comply with the rule. It absolutely is not.

Senator DANFORTH. That's your view.

Senator KASTEN. Senator Ford?

Senator FORD. I am interested in listening to these lawyers talk to each other. It reminds me of a case—a fellow turned around, asking a question, and he said to his lawyer, he said, "How should we go?" He said, "Go either way and we will sure make a case."

It comes down to those of us who are nonlawyers to try to determine what's in the best interest of the consumer, and this is what I intend to do. I hope I make that right decision. And also, we have heard a lot about the business community needing help, and that sort of thing, and I intend to make my judgment based on that.

Let me ask the panel, any one of them—Wendell, how do you spell your name?

Mr. MILLER. Same as you, Senator.

Senator FORD. With two "l"s?

Mr. MILLER. With two "l"s.

Senator FORD. Let me ask you this question. According to a recent Wall Street Journal article, it says the used car industry is booming. In these troubled financial times, many more people are turning to the used car market for the first time, for the first time, to buy an automobile.

Would this rule help those new used car buyers in their purchase?

Mr. MILLER. No. It will hurt And the reason the used car business is booming is simple, and that is the supply is going down, simply because the new car sales are going down, so the supply of used cars is diminishing, the ones that are turning over. So that is why, when the supply goes down, the price goes up, and the business booms, and that is what has happened to the used car industry—plus the fact that the new car prices are quite high, and people are moving down a notch and buying something that they can afford. From the standpoint of the basic purchases of used cars from the independent dealers and from the franchised dealers, in our business in used cars, thank God, it is booming also, because the attrition would be unbelievable if it were not. And that is what dealers are holding on by, by their used car departments, as I mentioned.

But to answer your question specifically, this would definitely hurt the used car business. Sales definitely would be lost from the dealer——

Senator FORD. Would it hurt the used car buyer?

Mr. MILLER. Oh, definitely it would hurt the used car buyer, because of the increased costs. One basic item of this agreement—and I am sitting on the firing line along with these gentlemen on my right—I guarantee you that a dealer will inspect and have to inspect to properly protect himself against potential lawsuits under this program. When that happens, the cost goes up, and many of the people who were able to afford a certain used car will be priced out of the market for that particular used car, and either be dropped down a notch or be moved out of the market entirely.

It has got to lower used car sales, and it has to shift those used car sales from the part of the economy that is hurting, and that is the franchised and nonfranchised dealer.

Senator FORD. Can we use the theory that if you used the same standard for all cars, that you would take an 8- or 10-year-old car and bring it back up to a 1-year-old car?

Mr. MILLER. That is absolutely impractical in any shop in the United States, and impossible.

Senator FORD. In essence, what they are saying, that you use the same rule, regardless of the age of the car?

Mr. MILLER. That rule is absolutely impossible to comply with. It just cannot be done.

Senator FORD. That would make a car that would be a lower priced car—raise the cost of that car up to where it is out of the range of the normal person to purchase?

Mr. MILLER. Absolutely.

Senator FORD. And they would be buying in that range, and getting what they would expect they would get for the dollars they are paying.

Mr. MILLER. It would definitely change a person's ability to buy a particular class of car and either move him down a notch or out of the market entirely.

Senator FORD. Mr. Greene, assuming that your statement is right that inspections will be required in many cases, what would be the ultimate cost to the consumer? Do you have any ball park figure?

Mr. GREENE. No, because of the unclarity of how many cars a dealer would actually observe that some condition exists and that he would have to identify a defect, and then, in addition to that, you would have to have into the equation some answer as to which of these defects would be repaired by the dealer, which would just be disclosed with the car sold "as is."

It would be a very difficult matter to try to specifically identify an overall cost, but certainly if you have to inspect, with the cost of today's mechanics, the cost of the vehicle would necessarily have to go up, or the dealer profit margin would have to go down. And many of them are hanging on by their fingernails now.

Senator FORD. Does FTC have an estimate? Has there been an estimate of what the normal cost increase——

Mr. GREENE. They say the only cost involved is printing the form, and the time to fill it out. Now, that is using the assumption, of course, that nothing else is required.

We are saying that the text of the rule clearly requires more than that. And the text of the rule is what prevails in any proceeding. It is not what the FTC describes as what the rule says; it is what the rule actually says, and that is what concerns us.

Senator KASTEN. Mr. Eikenberg?

Mr. EIKENBERG. We did a survey and came up with figures varying from $100 to $250 per unit if you did the complete inspection as would be necessary to comply with the reverse side of that form. That does not include any repairs that you may do, or any liability that may occur as a result of that.

And I would like to address that just 1 second. When I say no repairs that might be needed, you come to a very technical point of what is good brake lining when you inspect brakes. What is passable under a DOT standard may be good for you for 1,000 miles, for Mr. Lemov for 500,000, and for a teenager for 25 miles. It is very thin. Now, with a dealer, would a dealer replace the brake lining even though you could drive it for several thousand miles, thereby adding to the cost of the vehicle, to protect himself? Or would he sell the vehicle at a lower cost originally, and at some later point you may have to replace it?

Senator FORD. Some Senators around here drive like teenagers.

Mr. EIKENBERG. I don't believe that.

Senator FORD. I'm just kidding.

Mr. EIKENBERG. There is another point involved here, in the case of, for instance, tires on a new car. Tires are not guaranteed by the manufacturer of the vehicle. They are guaranteed by the maker of the tires. But if we were to clearly indicate that the tires were OK on this particular used vehicle that we were selling, and according

to specifications they could be very thin and still be OK, if that consumer drove down the road and that particular tire blew out and he hit a telegraph pole, what kind of liability would we have?

Senator FORD. I imagine that there will be, if this rule is passed, that there will be a push to increase the Legal Services' budgeting so that they will be able to increase lawsuits.

Mr. Chairman, may I just have one other final question?

Senator KASTEN. Certainly.

Senator FORD. Mr. Lemov, Mr. Greene may want to answer this, or others. I understand that those selling used cars who sell fewer than five a year are not covered by the rule. What effect would that have out in the marketplace if every used car dealer that sells five or less, or sells five or less used cars—what will that do to the market?

Mr. MILLER. That is half the market, and that is what bothers us the most. Obviously, the same number of used cars will be sold, but to different people on a different level. So it will not affect the total number of used cars available, but it will have a crunch on some aspects of the market.

There's absolutely no question that it will shift a portion of the market from franchised and unfranchised dealers to those people selling under five, which is the personal market, and that is the most unfair—blatantly unfair—aspect of the whole rule.

Senator FORD. You are excluding 50 percent of the sale of used cars under this rule. Those are in business who have a license and so forth—this could be the fellow that goes out and buys a car, is a garage mechanic, backyard, garage mechanic, and he does a little bolt-tightening and takes the vacuum cleaner and cleans it all out inside, and sells it, and it does not make any difference whether the tires are slick or whether the brake lining is thin or thick or whatever. He is scot-free under this, and that is 50 percent of your market.

Mr. MILLER. That's right.

Mr. EIKENBERG. And it will increase if this rule goes into effect.

Senator FORD. This has an indication to me that if you are exempt under the rule, that would increase that marketplace under that exemption.

Mr. EIKENBERG. Yes, sir.

Senator FORD. What we are doing, in my opinion, is even forcing those who are licensed to have their lot, to have their sign up, and you know their name, to take them down, and to—and those to sell against him, around the corner, out of their backyard, four or five cars a year. And since this market is a good market now, everybody is going to try to get in it. And if they do not have to go through all of these things and fill out papers and worry about stickers, then you are going to see that market increasing, in my opinion.

Mr. MILLER. One of the basic logics to support that, Senator, that the FTC uses, is that they have not had complaints in that area. And I would simply suggest that it just is not the nature of the person-to-person buyer to go anywhere else other than the person that he purchased the car from for that type of sale.

The reason is not because—the reason there have been very few complaints is not because those people have not complained, but simply because they have not complained to the FTC.

Senator FORD. Finally, has the FTC given any kind of cost estimate other than just a sticker? Do they have any documentation that this will not cost the consumer?

Senator KASTEN. To my knowledge, there has been no such documentation. I will direct the staff to determine from the FTC how they can determine the cost of complying, and if there are any additional costs other than just the cost of the sticker.

Senator FORD. How much time do we have left?

Senator KASTEN. Ninty days, beginning September 15.

Senator FORD. I thank the chairman.

Senator KASTEN. I made an error. Ninty days beginning September 9.

Senator FORD. That is 7 days sooner.

Senator KASTEN. I want to be accurate.

Senator Pressler?

Senator PRESSLER. I had an experience with my car just this past week, in which the bearing on the air-conditioner froze up. I had to replace it. The belt came loose and caused some damage. But the point is, there was not any inspection except taking the whole car apart that would have indicated that that bearing was about to go.

I guess had I bought that car just 10 days ago I would have filed a complaint with the FTC. If someone in the FTC felt it was worthy, the FTC would have gone to a Federal court and filed an action against the dealer. The dealer would then have a choice of paying a $10,000 fine or defending himself in U.S. Federal District Court, which is going to cost him at least $10,000. He would appear to be a dishonest businessman in his community. But yet, there is no reasonable inspection in my view—you could debate it, I suppose—that could determine when a bearing is going to freeze up on a used vehicle and when it is not. But an inspection of that sort would require taking the car apart. And this will cost consumers a great deal.

I do not think we have emphasized the vagueness enough, vagueness which will promote litigation. Can one of you comment on that? Is there any way to inspect? Nobody is against disclosure. I am for disclosure. We are talking about much more here. I wish Senator Danforth were still here. We are all in favor of disclosure. The litigation that is going to result is just enormous.

Mr. MILLER. One of the things that frustrated Senator Danforth was the fact that this could not be simply complied with. If this were strictly a listing or an indication of known symptoms, we still would not like it, but it might be possible to comply with.

This is an indication that we have to clearly indicate the disease, not the symptom, and that is where we run into the potential problem, and we cannot seem to be able to figure out any way to do that.

Mr. LEMOV. I might make a comment. The FTC could have avoided this can of worms relatively easily, and you wonder why they did not think of this, since they spent 7 years on the rule, or something like that. Had they simply put a box up there, saying: " 'As is' sale. None of the rest of the list applies. Buyer beware.

Look out. Talk to the dealer. What's wrong with this car? Have your own mechanic inspect it. 'As is' sale." That's what States allow now. That would have warned the buyer, given him the option to go out and get his own mechanic to look at the car, which is really the only way to be relatively sure that you're getting something.

But they didn't. For some reason or other, they allowed this major known-defect provision to override State law. They did not have to do it that way. They are very good draftsmen, and we think that is a major problem with the rule.

Mr. EIKENBERG. There is no way that we could inspect the car and be sure of that particular problem.

I would like to make another point. If you had bought that car off of Mr. Ford, or one of his members, or ours, I believe very seriously that you would not have had a problem if you went back to the dealer, because—in our testimony we show that even the FTC could only come up to one-tenth of 1-percent complaints. That did not mean that there were not problems; it means that the dealer that is in business trying to sell tomorrow has to do something about a problem that is really a problem that maybe was overlooked, maybe he did not know about. And under our warranties, we do cover that.

Senator PRESSLER. One final question. Suppose a little old lady in tennis shoes walking down the street sees "For Sale" on a car and goes and meets the owner and buys that car. I would contend if we need this kind of rule for sales by dealers we certainly need it for private sales as well. I am told that over half of the used car sales are private sales. And certainly in terms of safety and lots of other things, there probably is more of a need to have this rule for private sales. For sales from a franchised dealer, you have somebody to go back to.

But I think that used cars are being singled out, so to speak. Why don't we do this with all sales—used machinery, air-conditioners, typewriters. There would be no end to the Federal regulation, and I think that is the basic point.

Senator KASTEN. We have received word that a record vote will begin on the Senate floor. It will be the intention of the committee to recess for roughly 10 minutes, and when we come back, we will hear from the remaining witnesses as a panel, Susan O'Keefe from the Center for Auto Safety and John T. Montgomery from the consumer protection division in Massachusetts.

Before we do so, I think it is important to point out that these hearings are not intended in any way to be a threat to FTC regulation of the automobile industry or the used automobile industry. I think the remarks of some of the Senators suggested that opponents of this rule were trying to stop the FTC from regulating. We are simply saying that this kind of overregulation is not necessarily what the Congress or what the people of the United States of America intended. In other words, warranty disclosure is OK, but disclosure of known defects and the problems of definition of known defects could create a myriad of problems and tremendous additional costs.

It is not the committee's intention—and I do not believe it is the intention of the author of the disapproval resolution—to limit the

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Federal Trade Commission in its legitimate responsibilities. The idea of the congressional veto process is to say: "We, as elected officials who are representing people—consumers, automobile dealers, used automobile dealers, old people, young people—we are going to try to find some kind of balance between the legitimate needs of the consumers and the legitimate needs of people in commerce and industry." And that is the direction that we intend for this hearing.

Mr. GREENE. In regard to that comment, expanding on that comment, it should be noted—and perhaps some of the Senators are not aware of the fact that in the Federal Trade Commission Act, the provisions which provide for the legislative veto also provide that if Congress does, in fact, veto a rule, the Commission does not have to engage in any further proceedings. It can come back the next day, if it wants to, and issue another rule taking out the objectionable feature. That is a safety feature that Congress put into the legislative veto provisions.

We are not knocking out the FTC rule forever under the proceedings that are provided by law. I just wanted to make that point.

Senator KASTEN. The subcommittee will recess for 10 minutes.

[Recess.]

Senator KASTEN. The subcommittee will please come to order.

The next witnesses are Susan O'Keefe, Center for Auto Safety, and John T. Montgomery, chief of the consumer protection division, office of the attorney general of Massachusetts.

It will be the intention of the subcommittee to hear from Susan O'Keefe and John Montgomery for roughly 10 minutes each, and then the committee will ask questions of either of you or both of you. Each of you can respond to the other's questions if you should so choose.

Susan O'Keefe, Center for Auto Safety.

STATEMENTS OF SUSAN E. O'KEEFE, CENTER FOR AUTO SAFETY; AND JOHN T. MONTGOMERY, CHIEF, CONSUMER PROTECTION DIVISION, OFFICE OF THE ATTORNEY GENERAL FOR THE COMMONWEALTH OF MASSACHUSETTS

Ms. O'KEEFE. Thank you, Mr. Chairman. Thank you for this opportunity to voice consumer opposition to the veto of the Federal Trade Commission's trade regulation rule governing the sale of used cars.

I am a staff attorney for the Center for Auto Safety, a nonprofit, public interest research and advocacy group working to promote the safety, quality, and economy of motor vehicles.

Although the specific testimony is that of the Center for Auto Safety—Consumers' Union, the Consumer Federation of America, and the Automobile Owners' Action Council join us to oppose the legislative veto of this much needed trade regulation rule.

Today's hearing marks the first attempt by Congress to exercise the legislative veto of an FTC rule under section 21 of the FTC Improvement Act of 1980. The issue is whether the Congress should use this authority to nullify a rule which would protect consumers against demonstrated abuses in the used-car industry.

Because the used-car rule seeks to protect consumers from unscrupulous dealer practices, while imposing only minimal burdens

on the used-car industry, the center urges this committee to block the veto of this rule.

After extensive rulemaking proceedings demonstrating pervasive unfair and deceptive practices in the used-car industry, the FTC has issued a rule to protect consumers against unscrupulous dealers. Contrary to much publicized industry assertions, the used-car rule would not require used-car dealers to inspect vehicles prior to sale, nor would the rule mandate implied warranties. Rather, the rule would only require dealers to disclose to consumers, (1) basic warranty information and, (2) major defects known to the dealer.

The FTC's rulemaking record contains substantial evidence of the need for the used-car rule. That evidence demonstrates that used-car dealers frequently make oral misrepresentations concerning the extent of warranty coverage and the mechanical condition of the vehicles offered for sale.

Opposition to this rule has focused not on the warranty disclosure provisions but on the requirement that dealers tell consumers if they know that a major defect exists. The record documents that in a substantial proportion of used-car sales, major defects exist at the time of sale; that such defects are not disclosed to consumers even when known to the dealers; that used-car buyers have little or no mechanical knowledge and must therefore rely on the dealers' oral statements regarding condition and the vehicle's outward appearance in making a purchasing decision; and that such reliance is abused by dealers who misrepresent the condition of the vehicles.

As a consequence of such dealer deception, consumers face unanticipated repair bills, as well as the attendant costs of alternative transportation and lost wages.

To discourage used-car dealers from engaging in such deceptive practices, the FTC has promulgated a very minimal rule. Specifically, the used-car buyers guide would disclose the existence of any warranty coverage as well as the terms and conditions of any warranty offered, explain that an "as is" sale means that the dealer has no post-sale repair responsibility, and disclose major defects if known by the dealer at the time of sale.

In addition, the buyers guide contains a warning against reliance on spoken promises that are not confirmed in writing and suggests that consumers ask the dealer if a prepurchase inspection is permitted. Thus the rule does not mandate inspection, impose a warranty, or require dealers to repair defects known to exist.

Rather, the rule only requires that dealers be honest about defects known and post-sale repair responsibilities. If the rule goes into effect, consumers would be given whatever information the dealer already possesses concerning used-cars' mechanical condition and thus would be able to make informed purchasing decisions.

Knowing the existence of serious defects prior to sale, consumers could factor the cost of repairs into the actual purchase price. This is especially important to low-income consumers who cannot afford the substantial cost of repairing undisclosed and unsuspected defects appearing shortly after purchase.

Beyond the obvious benefits to consumers, the known-defect disclosure requirement would promote a healthier dealer market by

curtailing competition by unscrupulous dealers. Those honest dealers who already disclose known mechanical defects would no longer be injured by dishonest dealers who engage in these unfair and deceptive practices.

In an effort to defeat the rule, the industry has raised five principal arguments, none of which withstand scrutiny: (1) that the known-defects disclosure provision would require dealers to inspect prior to sale; (2) that the FTC has exceeded its statutory authority in requiring known-defect disclosure; (3) that the known-defect disclosure provision would mandate implied warranties thereby prohibiting the sale of used-cars "as is"; (4) that the rule is unfair in that it would not cover private sales; and (5) that compliance with the rule would require an additional 13 million work hours per year.

The rule would not mandate inspection. Section 455.6 of the rule specifically provides that dealers are not required to inspect cars offered for sale for the purpose of discovering defects. That the known major defects requirement is not equivalent to mandatory inspection is best illustrated by the fact that the NIADA advocated such a defect disclosure provision as an alternative to the mandatory inspection requirement recommended by the FTC staff in 1978.

Indeed, in NIADA's post-record comments to the FTC submitted in February 1979, NIADA stated that dealer disclosure of "significant known defects the dealer is personally aware of other than cosmetic or minor defects" could result in "a beneficial balance in consumer and dealer knowledge."

Furthermore, at the time, NIADA argued that disclosure of significant known defects "would effectively eliminate substantially all the alleged consumer abuses found in the FTC rulemaking record."

The second principal argument raised by the industry is that the FTC has exceeded its statutory authority in promulgating a rule which would require the disclosure of known defects. Although section 109(b) of the Magnuson-Moss Act directed the FTC to conduct rulemaking concerning used-car warranty practices, Congress evidenced no intent to limit the FTC's authority under other laws. Thus the FTC is within its authority in adding a known defect disclosure requirement under section 18 of the FTC Act.

Third, the rule would not mandate implied warranties. First, the buyers guide specifically cautions consumers not to assume that the car is necessarily free of defects if no defects are listed.

Second, section 2,316 of the UCC clearly provides that all implied warranties are excluded when the term "as is" is used. Thus if dealers check "as is," no implied warranties would be created.

At this point, I would like to mention that the dealers seem to be confusing an implied warranty with disclosure. Implied warranty governs only post-sale repair responsibilities. And in fact, in the case of "as is" sales, consumers are in more need of disclosure than any other kind of sale.

Fourth, the record does not support the extension of the rule to the private market. Dealers contend that if they are forced to disclose known defects while the private sellers are not, consumers will flee to the private market to avoid being told the known

condition of vehicles. The FTC's rulemaking record does not support the extension of the rule to the private market. Indeed, the record evidence shows that consumers get a greater amount of accurate information concerning significant mechanical defects from a private seller than from a dealer.

By improving the quality of information received from the dealer, the rule should operate to attract consumers who previously bought and sold privately because it was a better way—they thought it was a better way to get a good used-car.

Finally, dealers' assertions that compliance with the rule will cost 13 million work hours per year is ludicrous. Because dealers sell about 11 million annually, this averages out to 70 minutes per car. As the attached sample buyers guide form illustrates, dealers would only be required to fill in the terms of the warranty, if one is offered, and disclose, if they know, certain defects exist in the cars' major systems.*

Accordingly, it is difficult to imagine how a dealer would need more than a minute or two to complete one form. Assuming, as the FTC has estimated, that the cost of the sticker is about 18 cents, the total cost should not exceed 50 cents per vehicle.

Based on clear findings of unfair and deceptive trade practices in the used-car industry, the FTC has issued a rule which would require only that dealers disclose the extent of warranty coverage and the existence of known major defects.

Much to the disappointment of consumer groups, this rule represents a retreat from the mandatory inspection rule proposed in 1978. Nonetheless, because the rule would prevent and discourage the longstanding, demonstrated abuses in the industry, the center urges the committee not to disapprove the FTC's used-car rule. To veto the rule, which imposes only minimal burdens on dealers, would send a message to consumers nationwide that their voice is not to be heard above that of organized business.

Thank you, Mr. Chairman. If you have any questions, I will be glad to answer them.

[The statement follows:]

STATEMENT OF SUSAN O'KEEFE, STAFF ATTORNEY, CENTER FOR AUTO SAFETY

Mr. Chairman and members of the Committee, thank you for this opportunity to voice consumer opposition to the veto of the Federal Trade Commission's trade regulation rule governing the sale of used cars. I am Susan O'Keefe, staff attorney for the Center for Auto Safety, a non-profit public interest research and advocacy group working to promote the safety, quality and economy of motor vehicles.[1] Although this specific testimony is that of the Center for Auto Safety, Consumers Union, Consumer Federation of America and the Automobile Owners Action Council join us to oppose the legislative veto of this much-needed trade regulation rule.

The Center annually receives approximately 20,000 letters from consumers concerning the safety and quality of motor vehicles. Because much of this correspondence concerns dealer sales of used cars, the Center has maintained an active interest throughout the FTC's rulemaking proceeding.

Today's hearing marks the first attempt by Congress to exercise the legislative veto of an FTC rule, under Section 21 of the FTC Improvement Act of 1980. The issue is whether the Congress should use this authority to nullify a rule which would protect consumers against demonstrated abuses in the used car industry. Because the Used Car Rule seeks to protect consumers from unscrupulous dealer

*The attachment referred to has been retained in the committee files.

[1] Founded in 1970 by Ralph Nader and Consumers Union, the Center has been independent of both since 1973.

practices, while imposing only minimal burdens on the used car industry, the Center urges this Committee to block the veto of this Rule.

The FTC's rulemaking record contains substantial evidence of the need for the Used Car Rule. That evidence demonstrates that used car dealers frequently make oral misrepresentations concerning the extent of warranty coverage and the mechanical condition of vehicles offered for sale. With respect to warranty abuses in the industry, it is beyond dispute that used car dealers often mislead consumers into believing that they have broad warranty coverage, when in fact consumers receive little or no protection after sale. In the context of "as is" sales, which comprise half of used car sales, the record shows that it is a pervasive practice for dealers to give oral assurances like, "if anything goes wrong, just bring it back and we'll take care of it," which are contradicted by the written "as is" clause in the contract. Once the "as is" sale has been completed, consumers who return to their dealers to complain about problems arising shortly after purchase, discover that the "just bring it back" assurances were sheer puffery. As a result, the unwary "as is" car purchaser often finds him/herself stuck with unbudgeted repair expenses with no recourse against the dealer.

Opposition to this rule has focused not on the warranty disclosure provisions, but on the requirement that dealers tell consumers if they know that a major defect exists. The record documents that in a substantial portion of used car sales major defect exist at the time of sale; that such defects are not disclosed to consumers even when known to the dealers; that used car buyers have little or no mechanical knowledge and must therefore rely on the dealer's oral statements regarding condition and the vehicle's outward appearance in making a purchasing decision; that such reliance is abused by dealers who misrepresent the condition of the vehicles. As a consequence of such dealer deception, consumers face unanticipated repair bills, as well as the attendant costs of alternative transportation and lost wages.

To discourage used car dealers from engaging in such deceptive practices, the FTC has promulgated a rule which provides for the disclosure at the point of sale of (1) basic warranty information, and (2) major defects known to the dealer. Specifically, the Used Car Buyers Guide would disclose the existence of any warranty coverage, as well as the terms and conditions of any warranty offered; explain that an "as is" sale means that the dealer has no post-sale repair responsibility; and disclose major defects, if known by the dealer at the time of sale. In addition, the Buyers Guide contains a warning against reliance on spoken promises that are not confirmed in writing, and suggests that consumers ask the dealer if a pre-purchase inspection is permitted. Thus, the Rule does not mandate inspection, impose a warranty or require dealers to repair defects known to exist. Rather, the Rule only requires that dealers be honest about defects known and post-sale repair responsibilities.

If the Rule goes into effect, consumers would be given whatever information the dealer already possesses concerning used cars' mechanical condition, and thus would be able to make informed purchasing decisions. Knowing the existence of serious defects prior to sale, consumers could factor the cost of repair into the actual purchase price. This is especially important to low-income consumers who cannot afford the substantial cost of repairing undisclosed and unsuspected defects appearing shortly after purchase. Beyond the obvious benefits to consumers, the known defect disclosure requirement would promote a healthier dealer market by curtailing competition by unscrupulous dealers. Those honest dealers who already disclose known mechanical defects would no longer be injured by dishonest dealers who engage in these unfair and deceptive practices.

The used car industry, represented by the National Automobile Dealers Association (NADA) and the National Independent Automobile Dealers Association (NIADA), has raised five principal arguments in an attempt to defeat this rule, none of which withstand scrutiny.

First, dealers maintain that the known defect disclosure provision operates to require dealers to inspect used cars before offering them for sale. This argument ignores the language of § 455.6 of the Rule, which specifically provides that dealers are not required to inspect cars offered for sale for the purpose of discovering defects. Rather, the Rule merely requires that if the dealer knows that certain identified defects exist in a car, he must pass that information on to the consumer.

That the known defects disclosure provision is not equivalent to a mandatory inspection requirement is best illustrated by the fact that NIADA advocated such a defect disclosure provision as an alternative to the mandatory inspection rule recommended by the FTC Staff in 1978. Indeed, in NIADA's post-record comments to the FTC, submitted in February 1979, NIADA stated that dealer disclosure of "significant known defects the dealer is personally aware of other than cosmetic or minor defects" could result in "a beneficial balance in consumer and dealer knowledge." Furthermore, at that time NIADA argued that disclosure of significant

known defects "would effectively eliminate substantially all the alleged consumer abuses found in the [FTC rulemaking] record." [2]

The used car dealers would have this Committee believe that dealers know nothing about the mechanical condition of the cars they buy and sell. Not only does this defy common sense, but the FTC rulemaking record contains substantial evidence that dealers do obtain information about the quality of their used vehicles in the regular course of business. Those dealers who purchase cars at auctions can and do inspect for defects after purchase and have an option to rescind or renegotiate the sale if they find sufficient problems with the vehicle.[3] For those vehicles not purchased at auction, the industry practice is to appraise a vehicle before it is purchased. Such appraisal usually involves taking the car for a test drive, visually inspecting the body and mechanical condition of the car, and estimating the extent of repairs needed to make the car salable.[4] Finally, after dealers acquire vehicles, they have the opportunity to obtain more information about a vehicle's mechanical condition when determining what if any level of warranty coverage to offer.[5] This is not to suggest that the Rule would reqire dealers to do any of these things. The Rule would require only that dealers inform consumers if they know that a major defect exists.

The second principal argument raised by the industry is that the FTC has exceeded its statutory authority in promulgating a rule which would require the disclosure of known defects. The industry's statutory argument represents an about-face for the NIADA. When the NIADA espoused known defect disclosure as an alternative to mandatory inspection, NIADA specifically stated that such a requirement "will meet the mandate of §109(b) of the Magnuson-Moss Act."[6] Now the industry, having succeeded in defeating the mandatory inspection requirement, interprets §109(b) as limiting the FTC's authority to prescribe a rule mandating only the disclosure of warranty information. However, §111(a)(1) of the Magnuson-Moss Act makes plain that the Act "shall not be construed to repeal, invalidate or supersede the Federal Trade Commission Act . . ." Thus, the language of §109(b) does not prohibit the FTC from proceeding under Section 18 of the FTC Act to add a known defects disclosure requirement to the Rule.

Equally unsound is the third principal argument raised by the industry—that the known defect disclosure provision will have the effect of mandating an implied warranty on vehicles offered for sale. Dealers contend that by noting only certain defects on a given vehicle, the dealer might be implying that other aspects are acceptable, thereby creating an implied warranty.

This argument fails for two reasons. First, the Buyers Guide specifically cautions the consumer "that there may be defects that are unknown to the dealer. If nothing is listed, the car is not necessarily free of defects." Second, to say that this provision imposes a mandatory implied warranty is to misread §2-316 of the Uniform Commercial Code, which clearly provides that all implied warranties are excuded when the term "as is" is used.[7]

Fourth, dealers argue that the Rule is unfair in that it would not be applicable to private sales. Dealers contend that if they are forced to disclose known defects, while private sellers are not, consumers will flee to the private market to avoid being told the known condition of vehicles. The FTC's rulemaking record does not support the extension of the Rule to the private market. Indeed, the record evidence shows that consumers get a greater amount of accurate information concerning significant mechanical defects from a private seller than from a dealer. By improving the quality of information received from the dealer, the Rule should operate to attract consumers who previously bought and sold privately because they thought it was a better way to get a good used car.

Finally, dealers' assertion that compliance with the Rule will cost thirteen million work hours per year is ludicrous. Because dealers sell about 11 million used cars annually, this averages out to seventy minutes per car. As the attached sample Buyers Guide forms illstrate, dealers would only be required to fill in the terms of the warranty, if one is offered, and disclose if they know certain defects exist in the car's major systems. Accordingly, it is difficult to imagine how a dealer would need more than a minute or two to complete one form. Assuming, as the FTC has

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[2] NIADA Comments at 112-113.
[3] FTC Staff Report at 71, n. 58.
[4] *Id.* at 72, n. 60.
[5] *Id.* at 77-78.
[6] NIADA Comment at 113.
[7] Massachusetts, Maryland, Maine, Kansas and West Virginia prohibit "as is" sales of used motor vehicles. In other states, the ability to exclude the implied warranty from the contract is limited. *See* the FTC Staff Report's analysis of state law at 456-97.

estimated, that the cost of the sticker is about 18 cents, the total cost should not exceed 50 cents per vehicle.

CONCLUSION

Based on clear findings of unfair and deceptive practices in the used car industry, the FTC has issued a Rule which would require only that dealers disclose the extent of warranty coverage and the existence of known major defects. Much to the disappointment of consumer groups, this Rule represents a retreat from the mandatory inspection rule proposed in 1978. Nonetheless, because the Rule would prevent and discourage the long-standing, demonstrated abuses in the used car industry, the Center urges the Committee not to disapprove the FTC s Used Car Rule. To veto the Rule, which imposes only minimal burdens on dealers, would send a message to consumers nationwide that their voice is not to be heard above that of organized business.

Senator KASTEN. Thank you. I think we will listen to Mr. Montgomery's testimony first, and then we will ask you to respond to questions.

Mr. MONTGOMERY. Thank you. I want to thank you for the opportunity to speak to the committee today.

I am assistant attorney general in Massachusetts and chief of the consumer protection division there. I am here today representing Attorney General Francis X. Bellotti, who also serves as the chairman of the consumer protection subcommittee of the National Association of Attorneys General. He regrets that he was not able to address the Committee today himself.

Before I begin, I would like to ask the Chairman's indulgence to permit me to submit a formal written statement for the record next week. I expect my comments today to summarize that testimony.

Senator KASTEN. I thank you, and without objection, the full text of your statement will appear in the record.

Mr. MONTGOMERY. I have a statement from the consumer protection division of the Maryland attorney general's office which I will also submit for the record.

I want to register our strong support for the Federal Trade Commission's used car rule and urge that you do not disapprove the rule. We believe that the rule creates a simple yet cost-effective mechanism for enforcing the existing obligations in the used car industry and that the rule represents an appropriate exercise of Federal authority to protect consumers.

Massachusetts, like many other States, has made a determined effort in recent years to address the problem of unfair and deceptive practices in the used car market. The consumer protection division in Massachusetts receives approximately 12,000 consumer complaints annually of which at least 50 percent involve automobile sales and repairs. In addition, many more thousands of complaints are registered with 28 local consumer agencies in Massachusetts.

Our investigation and mediation of these complaints, as well as our considerable volume of litigation against used car dealers, indicates that unfair and deceptive practices in the industry are pervasive. Recognition of the scope of these practices prompted Attorney General Bellotti in 1976 to promulgate a comprehensive set of motor vehicle regulations under authority delegated to him by our State consumer protection act.

I want to emphasize, however, that additional regulation specifically addressing the disclosure of warranties and the condition of vehicles at the time of sale were held in abeyance, pending the outcome of the FTC rulemaking process in the belief that these issues might better be addressed on a uniform national basis.

We submitted a series of comments and exhibits in the course of the Commission's thorough rulemaking proceeding. We supported stringent measures, including mandatory inspection which the Commission rejected. We are in support of the rule and believe that it represents an important advance for consumers.

Most of the unfair and deceptive practices in the used car industry stem from the simple fact that consumers lack the ability to ascertain the mechanical condition of vehicles. They often think they are buying a creampuff, when they may be buying a lemon. Consumers are forced to rely on the honesty and expertise of the used car dealer and the prevailing standards of ethics within the industry. They are highly vulnerable to misrepresentations of material fact, as well as failures to disclose the condition of used cars.

There is no question that used car dealers possess a substantial amount of information concerning the vehicles they sell. Most used cars are purchased by dealers for resale only after a prepurchase inspection, whether the vehicle is acquired through a dealer auction, a trade-in, or a private purchase.

In addition, dealers routinely conduct further inspections after purchase, incident to setting a sale price. However, there is little dispute that full disclosure is rarely made to consumers.

It is important to note, though, that the failure to disclose known defects is not, in my view at least, necessarily motivated by dishonesty, despite the fact that the nondisclosure produces a significant consumer injury. In our experience in dealing with motor vehicle dealers, particularly where we have indicated our intention to sue them, we find that many dealers are quite honestly unaware of the fact that the failure to disclose a known defect is an unfair deceptive practice, prohibited by State and Federal law. Because it is not the general practice in the industry to make such disclosures, even honest dealers, I believe, decline to make them.

As a result, the rule of caveat emptor prevails in the used car industry, despite its repudiation long ago by Congress through the Federal Trade Commission Act and in each of the 50 States through the Uniform Commercial Code and State consumer protection acts.

The disclosure of known defects which is mandated by the used car rule merely creates a uniform system for insuring compliance with what I think is established law.

It is clear that section 5 of the FTC Act bars any act or practice which has the capacity or tendency to deceive consumers in any material respect.

Now, the failure to disclose known material facts when consumer injury results form the nondisclosure is prohibited by long-standing interpretation by the Federal Trade Commission, as well as the Federal courts under that act.

Furthermore, as I believe Senator Cannon recognized this morning—and I know Senators Danforth and Gorton know from personal experience, all 50 States have adopted consumer protection stat-

utes which are similarly aimed at preventing deception in the marketplace. Many of these statutes are patterned after the language of the FTC Act and often specifically direct State courts to be guided by Federal precedent.

In my view, the knowing failure of a used car dealer to disclose a serious mechanical defect which he knows about violates the law of most, if not all, of the 50 States. Therefore, the used car rule does not alter the substantive law, but establishes only a minimum standard for compliance with existing law.

I would add that Massachusetts' substantive law clearly goes far beyond the disclosure requirements of the FTC used car rule and requires, in any individual case, disclosure of any condition which may materially affect the purchase decision of the buyer.

Now, while the rule proposed by the FTC or promulgated by the FTC, requires only minimum compliance with existing law, we expect certainly that it will alter, if it becomes effective, conditions in the used car market to the benefit of consumers and honest dealers. We expect that most dealers will comply with the rule and that substantial industry compliance will be reinforced by market pressures as consumers come to expect defect disclosure.

Since consumers will be better equipped to anticipate the true purchase cost of used cars, including repair costs, and may anticipate them, before making a decision to purchase the car, prices should reflect the true value, as opposed to the appearance value of the car.

I think it can also be expected that the defect disclosure will reduce reliance on the oral representations which I think everybody agrees have been so troublesome. We are aware that the rule has been criticized on the grounds that it will increase the price of vehicles through higher inspection costs and increase litigation and reduce the market share of used car dealers versus private sellers.

I would like to briefly comment on these points.

First: The rule does not require dealers to inspect vehicles. And I agree with Senator Danforth that we should accept the precise wording of the rule, as well as the statements of the Federal Trade Commission that it does not require inspection.

It is based on the finding by the Commission, however, that dealers do inspect to some degree, and therefore acquire actual knowledge of defects. The rule will compel honest competent dealers to disclose only information which is already produced by customary business practice.

Second: I firmly believe that increased information disclosure and disclosure of known defects will reduce the likelihood of litigation, not increase it. In our experience, disputes between consumers and business are most often the result of failed expectations. Disclosure of information concerning the mechanical condition of a car will clearly reduce the expectations of the consumer concerning the functioning of that particular defective part. In litigation in which our office is involved and in litigation involving private consumer suits against businesses, the two key issues are whether, in fact, there was a defect and whether, in fact, the dealer knew about it. Now, if a dealer complies with the used car rule, those issues have been removed, which I think substantially minimizes the likelihood of litigation. If, in fact, the dealer does not comply with the used

car rule and does not make the required disclosure, then the status quo has been preserved, at least under current State law.

Finally: There is no reason to believe that the disclosure of known defects will lead consumers to desert the commercial market. In fact, I think the opposite effect should result. Our office receives relatively few complaints about private sellers of used automobiles, and we think that this confirms the Commission's conclusion that consumers receive more accurate information in the private market.

Our contact with consumers in Massachusetts indicates that the private market includes many consumers who have little or no confidence in used car dealers. And I believe that this rule should have the salutory effect of enhancing dealer reputation to the extent that they make clear and honest disclosures, and thereby possibly increase the dealer share of the market.

Now, one final point that I would like to make. We believe that the used car rule is a proper exercise of Federal regulatory authority. While States such as Massachusetts have taken a number of steps to protect our consumers, we believe and agree with the FTC, that a uniform rule is required here. The rule is designed to supplement and not to displace existing or future State systems of disclosure.

Numerous State and local officials participated in the rulemaking proceeding and uniformly supported the concept of defect disclosure. In fact, the benefits of this kind of rule may not be available to an individual State in an area such as New England. Consumers in Massachusetts often purchase used cars in adjoining States of New Hampshire, Vermont, Connecticut, and Rhode Island. If Massachusetts alone were to enact such a disclosure rule, I believe it is likely that misrepresentations would continue in adjoining States, possibly harming the competitive position of Massachusetts dealers.

In conclusion, we believe that the used car rule is a simple, cost-effective means of providing information concerning used cars to which consumers are clearly entitled, both under current law and decent standards of business practice. And we urge you not to exercise your veto authority over it.

Thank you.

[The statements follow:]

STATEMENT OF JOHN T. MONTGOMERY, ASSISTANT ATTORNEY GENERAL, CHIEF, CONSUMER PROTECTION DIVISION, COMMONWEALTH OF MASSACHUSETTS

My name is John T. Montgomery. I am an assistant attorney general and chief of the Consumer Protection Division in the Department of the Attorney General for the Commonwealth of Massachusetts. I am here today representing Attorney General Francis X. Bellotti, who also serves as Chairman of the Consumer Protection Subcommittee of the National Association of Attorneys General.

At the outset, I want to register our strong support for the Federal Trade Commission Used Car Rule, and to urge that you do not disapprove the rule. In summary, we believe that (1) the rule creates a simple yet cost effective mechanism for enforcing existing legal obligations in the used car industry and (2) that the rule represents an appropriate exercise of federal authority to protect consumers.

Massachusetts, like many other states, has made a determined effort in recent years to address the problem of unfair and deceptive practices in the used car market. The Consumer Protection Division in Massachusetts receives approximately 12,000 consumer complaints annually of which at least 50 percent involve problems with automotive sales and repairs. In addition, many more complaints are regis-

tered with 28 local consumer agencies in the Commonwealth. Many of these complaints concern unfair or deceptive practices in the sale of used motor vehicles. Our investigation and mediation of these complaints, as well as our considerable volumn of litigation against used car dealers indicates that unfair and deceptive practices in the industry are pervasive.

Recognition of the scope of these practices prompted the Attorney General in 1976 to promulgate a comprehensive set of Motor Vehicle Regulations under authority delegated to him by the state Consumer Protection Act. General Laws c.93A § 2(c). Section 4 of these regulations pertains specifically to motor vehicle sales, including some regulation of warranty disclosure and performance practices. These regulations, along with the Massachusetts statutory prohibition against "as is" sales of consumer goods, affords Masachusetts used car purchasers substantial protection. It is important to note, however, that additional regulations specifically addressing the disclosure of warranties and the condition of vehicles at the time of sale were held in abeyance pending the outcome of the FTC rulemaking process in the belief that these issues might better be addressed on a uniform national basis. To this end, we submitted a series of comments and exhibits in the course of the Commission's open, exceptionally thorough rulemaking proceeding. Like many other states we supported a mandatory inspection rule and other more stringent measures which the Commission ultimately rejected.

The experience of the Massachusetts Attorney General and the Federal Trade Commission amply demonstrates that the two catagories of information most important to inform used car purchasers are: (1) the condition of the vehicle, and (2) the warranties covering the vehicle. The information system established in the Used Car Rule directly addresses both of these essential needs through a series of mandated disclosures. I will focus my comments, however, primarily on the requirement that dealers disclose known defects to prospective purchasers. It is this defect disclosure requirement which I consider the cornerstone of the Used Car Rule.

Most of the unfair and deceptive practices in the used car industry stem from the simple fact that consumers lack the ability to ascertain the mechanical condition of motor vehicles. Cosmetic improvements will often convince them that they are buying a "cream puff" when they may well be buying a "lemon". Realistically, consumers are forced to rely on the honesty and expertise of the used car dealer, and the prevailing standard of ethics within the industry. Consumers are thus highly vulnerable to dealer misrepresentations of material facts concerning the conditions of used cars. The record in the rulemaking proceeding, as well as our experience in Massachusetts, reveals overwhelming evidence of failures to disclose known defects and oral misrepresentations concerning the quality, condition or drivability of vehicles.

There is no question that used car dealers possess a substantial amount of information concerning the vehicles they sell. Most used cars are purchased by dealers for resale only after a prepurchase inspection, whether the vehicle is acquired through a dealer auction, trade-in or a private purchase. In addition, dealers routinely conduct further inspections after purchase incident to setting a sale price. However, there is little dispute that full disclosure is rarely made by dealers to consumers.

It is important to note, however, that the failure to disclose known defects is not necessarily motivated by dishonesty, despite the fact that nondisclosure produces significant consumer injury. In our experience, many dealers are unaware of the fact that the failure to disclose a known defect is an unfair or deceptive practice prohibited by state and federal law. Therefore, because it is not the general practice in the industry to make such disclosures, even honest dealers often avoid full disclosure. As a result, the rule of caveat emptor prevails in the used car industry, despite its repudiation long ago by Congress through the Federal Trade Commission Act, and each of the 50 states through the Uniform Commercial Code and state consumer protection acts.

The disclosure of known defects mandated by the Used Car Rule merely creates a uniform system for insuring compliance with established law. The Commission has included a succinct statement of the legal basis for the rule in its Statement of Basis and Purpose. It is clear that Section 5 of the Federal Trade Commission Act bars any act or practice which has the capacity or tendency to deceive consumers in any material respect. Thus affirmative misrepresentations concerning the condition of a used car violates the law. In addition, the failure to disclose material facts when consumer injury results from such non-disclosure is prohibited by longstanding interpretations of the Federal Trade Commission Act.

Furthermore, all 50 states have adopted consumer protection statutes which are similarly aimed at preventing consumer deception in the marketplace. Many of these statutes are patterned after the language of Section 5 of the FTC Act, and

often specifically direct state courts to be guided by federal precedent. In my view, the knowing failure of a used car dealer to disclose a serious mechanical defect violates the law of most, if not all, of the 50 states. Therefore, the Used Car Rule does not alter the substantive law of deceptive practices, but merely establishes a uniform minimum standard for compliance with existing law.

While the Rule requires only minimum compliance with existing law, it can nevertheless be expected to alter conditions in the used car market to the benefit of consumers and honest dealers. We expect that most dealers will comply with the Rule, and that substantial industry compliance will be reinforced by market pressures as consumers come to expect defect disclosure. Since consumers will be better equipped to anticipate the true purchase cost of used cars (including repair costs) before making a purchase decision, prices should reflect the true value as opposed to the "appearance" value of the car. It can also be expected that the defect disclosure will reduce reliance on oral representations which have proved so troublesome, and will increase the rate of comparison shopping. Perhaps most importantly, defect disclosure should substantially improve consumer confidence in the used car industry.

We are aware that the rule has been criticized on the grounds that it will increase the price of vehicles through higher inspection costs and increased litigation, and reduce the market share of used car dealers versus private sellers. I would like to briefly comment on these points.

First, the Rule does not require dealers to inspect vehicles. However, it is based on the finding by the Commission that dealers do inspect to some degree and thereby acquire actual knowledge of defects. The Rule will compel honest, competent dealers to disclose only information which is already produced by customary business practice. We believe this type of dealer dominates the used car market, and therefore the Rule will not have a cost impact on the majority of dealers. Less competent dealers may ultimately have to improve their business practices and expertise to the extent that consumers come to demand adequate disclosure of defects. However, increased consumer awareness and comparative shopping will reduce the likelihood that their costs will be passed on to consumers.

Second, I firmly believe that increased information disclosure will reduce the likelihood of litigation. In our experience disputes between consumers and business are most often the result of failed expectations. Disclosure of information concerning the mechanical condition of automobiles clearly will alter the expectation of purchasers of used cars. Disclosure of known defects eliminates questions which are paramount in current litigation concerning the existence of the defect as well as the dealers knowledge of the defect at the time of the sale. In states such as Massachusetts which imply a warranty of merchantability in the sale of all consumer goods, disputes regularly arise concerning the extent of the dealer's warranty obligation with respect to known defects which render the vehicle unfit for ordinary use. Litigation concerning such issues will hardly be effected by the Used Car Rule.

Finally, there is no reason to believe that the disclosure of known defects will lead consumers to desert the commercial market. In fact, the opposite effect should result. It should be pointed out that our office receives relatively few complaints about private sellers of used automobiles. This confirms the Commission's conclusion that consumers obtain more accurate information in the private market. In addition, our contact with consumers in Massachusetts suggests that the private market includes many consumers who have little or no confidence in used car dealers. As I have previously stated, the rule should have the salutory effect of enhancing dealer reputation and possibly increasing dealer share of the market.

One final point is in order. We believe that the Used Car Rule is a proper exercise of federal regulatory authority. While states such as Massachusetts have taken a number of steps to protect consumers in the used car market, we agree with the FTC that a uniform national disclosure system is appropriate here. The rule is designed to supplement and not displace existing or future state systems of disclosure. Numerous state and local officials particpated in the rulemaking proceeding, and uniformly supported the concept of defect disclosure. In fact, the benefits of such a rule may not be available to an individual state in an area such as New England. Consumers in Massachusetts often purchase used cars in adjoining states of New Hampshire, Vermont, Connecticut and Rhode Island. If Massachusetts alone were to enact such a dislcosure rule, it is likely that misrepresentations would continue in adjoining states possibly harming the competitive position of Massachusetts dealers.

In conclusion, we believe the Used Car Rule is a simple, cost effective means of providing information concerning used cars to which consumers are entitled under

the law and decent standards of business practices. We urge you not to exercise your veto authority over the Rule.

STATEMENT OF H. ROBERT ERWIN, JR., CHIEF, CONSUMER PROTECTION DIVISION, OFFICE OF ATTORNEY GENERAL, STATE OF MARYLAND

My name is H. Robert Erwin, Jr., and I am the Chief of the Consumer Protection Division of the Office of the Attorney General of the State of Maryland. The Division was created by statute for the purpose of enforcing the Maryland Consumer Protection Act, a "mini-FTC" statute. The Division handles approximately 13,000 complaints each year from Maryland consumers, many of which deal with the problems consumers encounter in their purchases of used automobiles.

Briefly, by way of background, I have been employed as the Chief of the Division since February 1979. Prior to that, I spent six and one half years first as a staff attorney and later as the Director of the Consumer Law Center of the Legal Aid Bureau of Baltimore, Inc. During that period I provided private legal representation to literally hundreds of lowincome Maryland consumers. A substantial number of these cases involved consumer problems flowing from the purchase of an allegedly defective used car. I have personally interviewed and represented consumers in cases involving misrepresentations in the sales of used cars, breach of express or implied warranties given in the sale of used cars, as well as repossessions following consumers withholding payments because they felt the used automobile they purchased was defective.

In my experience, consumers encounter significant problems in purchasing used motor vehicles. For example, in calendar year 1980, the Division received 1,043 complaints against used automobile dealers. While we do not keep a statistical breakdown of how many of these involve used cars rather than new, I do know that a significant number does involve used cars. Almost invariably, although the consumer is dissatisfied with the used car he or she has purchased, they are in a very poor position to accurately evaluate the mechanical condition of the car they have bought even at the time they are filing the complaint with the Division. The Division finds these complaints particularly difficult to handle because, at the present time we do not have the resources to include on our staff an individual with expertise such as a trained auto mechanic. We frequently find ourselves in the position of relying on volunteer mechanics to inspect consumers' automoibles so we can accurately evaluate the substance of their complaint. But, obviously, these resources are severely limited. Because I believe that the Federal Trade Commission Trade Regulation Rule regarding the Sale of Used Motor Vehicles would go a long way toward preventing many of the problems which we encounter, I would urge Congress not to exercise your authority to disapprove this proposed rule.

I am sure the Committee is already aware that the proceeding before the Federal Trade Commission leading to their adoption of the Rule on August 14, 1981, took in excess of five years and involves literally thousands and thousands of pages of testimony and comments contained in many, many volumes. Consequently, it seems to me that one of the first questions that this Committee must face is how to adequately review this rule within the relatively short time span of ninety days of continuous session. Without suggesting any limitations on your prerogatives in reviewing this rule, I would like to organize these comments into what seems to me to be three manageable yet fundamental questions which you should ask yourself in deciding whether to approve or disapprove this rule.

I would respectfully suggest that the initial question which this Committee must consider is whether or not the rule comes within the lawful scope of the authority of the Federal Trade Commission. Clearly, Congress ought to disapprove any rule which exceeds the lawful authority of the Commission to adopt. However, in the present instance, it would seem equally clear that this rule is within the lawful scope of the Commission's authority. Section 109(b) of the Magnuson-Moss Warranty Act clearly authorizes and directs the Commission to initiate a rule making proceeding dealing with warranty and warranty practices in connection with the sale of used motor vehicles. In addition, deception or misrepresentation regarding the terms of warranties or the mechanical condition of used motor vehicles would clearly come within the scope of section 5(a)(1) of the FTC Act, and consequently, would potentially be appropriate subjects for a rule making proceeding under section 18(a)(1) of that Act. Since this rule is rather clearly within the Federal Trade Commission's legal authority, Congress should not disapprove of it for this reason and should turn to other considerations.

The second question it seems to me which you should consider is whether or not there was "substantial evidence" to support the Commission's findings that "unfair

or deceptive acts or practices" are presently occurring in the connection with the sale of used motor vehicles. It seems to me that Congress would face an impossible task if it attempts to independently evaluate all of the evidence which was before the Commission in the short time span available to you. Consequently, I would recommend that you adopt the same type of test used by Courts in reviewing administrative agencies determination and use your limited time to review the evidence before the Commission in order to determine whether or not there was "substantial evidence" to support their findings.

While I do not purport to have independently reviewed all, or even any significant portion, of the evidence before the Commission myself, it would appear to me reasonably clear from the Commission's summary of the evidence (46 Federal Register 41331-41339) that there was indeed substantial evidence before the Commission to support their finding of the occurrence of unfair or deceptive acts or practices. I will not attempt to reiterate all of that evidence in these comments since you are clearly capable of reading it yourselves, and I would only add that my past nine years' experience in representing consumers in the difficulties they have encountered in purchasing used cars clearly supports all of the conclusions of the Commission in this regard. Consequently, I do not believe the Congress should disapprove the rule on this basis.

The final question which I would suggest you must consider is whether or not the proposed rule is reasonable in scope as a remedy to the problem which the Commission has found. Certainly one of your major functions in exercising your "veto power" over agency rule-making is to disapprove those rules which drastically exceed a reasonable remedy to the problem.

Here again, however, it would seem to me that the proposed rule is rather clearly limited in scope and specifically tailored to address the problems which exist. Since I am sure you are all already familiar with the substance of the rule, it is not necessary for me to reiterate it in detail here.

The thrust of the rule is to give consumers adequate disclosures to enable them to bargain equally with dealers in the sale of used cars. Both the evidence in the record and simple common sense would more than amply demonstrate that equality of bargaining of position does not presently exist. The dealer generally knows where the automobile was acquired, the consumer does not. The dealer often knows if the automobile has been involved in an accident; the consumer does not. The dealer frequently knows if the automobile has any major defects; the consumer does not. The dealer always knows what steps have been taken to prepare the car for sale; the consumer does not. The dealer knows precisely the terms of the warranty coverage he or she is offering; the consumer does not. This rule does little more than alert the consumer to the questions he or she ought to be asking and requires the dealer to provide accurate answers to those questions.

It certainly does not seem unreasonable to me to require sellers of used cars to make clear to their customers the precise warranty terms prior to the sale, and to legally prohibit dealers from misrepresenting the terms of their warranties. It certainly does not seem unreasonable to me to require dealers to share with their customers information which the dealer has about know defects in the automobile. Prohibiting misrepresentation and requiring disclosure of such fundamental information is vital to both our basic notions of contract law and our free enterprise competitive economy. If disreputable used car dealers are permitted to continue to blatantly misrepresent such basic facts or even by silence to take advantage of naive customers, it is not only consumer purchasers who suffer; it is also reputable used car dealers who offer an honest value for the dollar.

In conclusion I hope that the Committee will find that the approach which I have suggested here is useful to you in your review of this rule and that you will agree with my conclusions that the rule is within the lawful scope of the authority of the Federal Trade Commission, is supported by "substantial evidence" in the record before the Commission, and that the remedy proposed by the Federal Trade Commission in the rule is a reasonable one in relation to the nature of the problem identified. I urge the Congress not to exercise its "veto power" and disapprove the Commission's Trade Regulation Rule regarding the sale of used motor vehicles. Thank you very much.

[The following information was subsequently received for the record:]

THE COMMONWEALTH OF MASSCHUSETTS,
DEPARTMENT OF THE ATTORNEY GENERAL,
Boston, November 19, 1981.

Hon. ROBERT W. KASTEN, JR.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: In your letter of November 10, 1981, you have asked me to respond to four questions as a supplement to my testimony on the FTC Used Car Rule. I am pleased to have this additional opportunity to assist the Subcommittee. My responses to your questions are as follows:

Question 1. Some have expressed concerns about the FTC's ability to enforce their proposed rule. Do you share that concern? Aren't state and local government bodies better able to enforce this kind of rule?

Answer. As I stated in my previous testimony, we expect that the automobile industry will voluntarily comply with the Used Car Rule. Success of any governmental regulation depends on such voluntary compliance by business and individuals. It is our understanding that the FTC will encourage voluntary compliance through an extensive educational program compliance monitoring, as well as enforcement action. The FTC has conducted similar programs in connection with its other trade regulation rules, including most recently rules governing mail order purchases and franchising and business opportunity ventures. We have found these FTC programs to be extremely effective in encouraging a high degree of compliance.

We have never considered the FTC to be the exclusive enforcement agency for its trade regulation rules. Massachusetts, like many other states, has regularly enforced these rules. Since many state consumer protection acts are patterned after the Federal Trade Commission Act, a violation of a Trade Regulation Rule is generally a sound basis for asserting a violation of state law. Therefore, state enforcement should be viewed as a supplement to FTC efforts to ensure compliance with the rule.

Question 2. From your point of view, is a state's right to petition for an exemption from the FTC rule a workable concept? What would it cost a state?

Answer. The FTC exemption procedure for the Used Car Rule mirrors similar provisions in a number of federal statutes. E.g., the Food, Drug and Cosmetic Act, 21 U.S.C. § 36K; Consumer Product Safety Act, 15 U.S.C. § 1476. It has become commonplace for Congress to include sweeping preemption language in federal statutes, while providing that any state may petition for an exemption from preemption under certain conditions. The exemption process has proved workable where the agency adopts standards and procedures for exemption which facilitate the preservation of more stringent, nonconflicting state law.

The Federal Trade Commission, in recent years, has been extremely sensitive to the concerns of state officials. In fact, during the course of the rulemaking proceedings on the Used Car Rule, the FTC on two occasions amended the Used Car Rule to avoid conflict with Massachusetts law (and the law of other states with similar requirements). It is my understanding that the FTC intends to facilitate the exemption process during the six month period following Congressional review and prior to the effective date of the Rule. Therefore, it appears to us that any cost associated with the exemption process would be minimal.

Question 3. You seem to believe that the Rule's requirement for disclosure of known defects doesn't add much to existing state consumer protection statutes. Then why have it? Why do we need uniformity from state to state?

Answer. Congress, like many states, has legislatively declared that unfair and deceptive practices are unlawful. I have previously testified that the failure to disclose known defects is a violation of state and federal law. However, the fact that such conduct is unlawful does not necessarily ensure that it will not occur. In fact the record in this rulemaking proceeding and the experience in Massachusetts establishes that such unfair and deceptive practices repeatedly occur in the used car market.

Rulemaking has been recognized as an effective means to implement broad legislative policy. While it may be deceptive to fail to disclose known defects, the law does not prescribe for dealers the manner of disclosure nor does it outline the precise boundaries or limits to disclosure. For example, the general rule of law does not define terms such as "defect", nor does it mandate that disclosures be provided in writing. A uniform system of disclosure, then, promotes disclosure of important consumer information by setting sensible guideposts for compliance with existing law.

Question 4. Some of those commenting on the Rule, including the Wall Street Journal and at least one senator, have said, in effect, that the disclosure of known

defects requirement would cause dealers to learn as little as possible about the car so that there would be fewer defects they would have to disclose. Can you comment?

Answer. The record in this proceeding establishes that warranties and mechanical condition are powerful factors in consumer purchasing decisions. Most used cars are sold with an express warranty of some type, primarily in response to consumer demand for this type of protection. It is unlikely that any used car dealer would assume warranty liability without an examination of the mechanical condition of the vehicle. Furthermore, even where a vehicle is sold "as is" it is obvious that the dealer must examine the condition of the vehicle in order to assess its value at the time it is acquired by the dealer. This is necessary in order to determine whether the price the dealer is paying is a fair one, and also to enable the dealer to set a competitive retail price for the vehicle.

I hope that my answers to your questions will be helpful to the subcommittee. Please contact me if I can provide any further assistance to you.

Very truly yours,

JOHN T. MONTGOMERY,
Chief, Consumer Protection Division,
Public Protection Bureau.

Senator KASTEN. Mr. Montgomery, on a broader question, do you support the concept of legislative veto?

Mr. MONTGOMERY. That is a difficult question to answer. I have to speak personally here. I support the concept of very careful congressional oversight over Federal agencies. I can state that we have, on a number of occasions in Massachusetts, been very concerned about the exercise of Federal regulatory authority, which we believe intrudes on State prerogatives. And we have expressed that displeasure very clearly.

However, while I believe in congressional oversight, I am not sure that I am in a position to comment specifically on congressional veto.

Senator KASTEN. Susan, it's my understanding that your organization from time to time has been opposed to congressional veto; is that correct? And is that your position at the present time?

Ms. O'KEEFE. That is correct. The Center for Auto Safety has taken the position the legislative veto is an unconstitutional use of congressional authority. I do not think that that is the issue during this hearing. You have the existing authority at this point in time. The question is: What is the appropriate use of the authority?

Senator KASTEN. I want to get it on record. It was my understanding that both of your groups opposed the whole idea of legislative veto.

Mr. MONTGOMERY. Mr. Chairman, the Massachusetts attorney general has not expressed any official view on congressional veto, although we have, as I said—asked Congress on occasion to take a close look and to take steps to override what Federal agencies have done. So, we do think that oversight is appropriate in certain cases. We just do not think that this is such a case on the merits.

Senator KASTEN. In Wisconsin, we have a rule that some would argue is more stringent than the FTC rule. I think all of us would recognize that it is easier to enforce and more predictable. And we have penalties that are slightly less than the penalties for violation of the FTC rule.

But even with penalties that you can count on and with a clear-cut mandatory inspection, the evidence is clear that the proportion of used cars sold by dealers in Wisconsin has declined. A growing number of used cars are being sold by gas stations and by private individuals using want-ads in the newspapers. It is not as big a

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switch as you might think, but it is a switch. And the evidence is there.

I believe that because this rule is so unclear, and, frankly, so scary to the average used car dealer, that this rule would push people out of the proposed regulated market, if you will, and into the unregulated market. That is happening in Wisconsin.

Now, what is the evidence that you have? Or why is it you both have the idea that the rule won't push people out of the regulated into the unregulated market?

Susan?

Ms. O'KEEFE. I think—in answering that question, I have to talk about the cost that consumers bear when buying a vehicle. The true cost of ownership represents not only the purchase price but the repair expenses that may face the consumer later on. And I think that if consumers are better apprised of the actual costs of vehicles that they are going to purchase, as I think this rule would require, they would be more likely to buy from a dealer.

I think that honest dealers will benefit from this rule.

Senator KASTEN. Do you have any evidence to that effect, or is that just your opinion? The evidence in Wisconsin is the opposite.

Is there another industry group that you have studied in which regulation meant that the regulated group grew and the unregulated group did not grow? It seems contrary to commonsense that with imposed regulations and imposed costs, whether it is these kinds of regulations or whatever, you will see more growth in the unregulated side.

I just want to know if you have any evidence in some other industry group you have studied or are familiar with. The answer is no, you have not?

Ms. O'KEEFE. No, I do not, Mr. Chairman.

Mr. MONTGOMERY. I can state that in Massachusetts it is my understanding from the Automobile Dealers Association that despite the fact that we do not have this type of a regulatory system, either the Wisconsin system or the FTC proposed system, that the private sale market has increased steadily over the years.

Senator KASTEN. As a proportion of total used car sales?

Mr. MONTGOMERY. As a proportion of the total market. I am told that that is true. And from talking to consumers and talking to consumer groups, we believe this is a function, to a very significant degree, of a lack of consumer confidence in used car dealers.

I think to the extent that Government aids honest, competent dealers in making disclosures of known defects, that that will increase the confidence of consumers in dealers, since the mechanical conditions is undoubtedly, along with price, the number one concern of consumers.

Senator KASTEN. Unfortunately, once more, evidence in Wisconsin is the contrary. We can count the number of cars and the proportion going up.

Ms. O'Keefe, in your testimony, you said that the evidence demonstrates that used car dealers frequently make oral misrepresentations concerning the extent of warranty coverage. With respect to abuses in the industry, "it is beyond dispute that dealers often mislead," and so on and so on. You mentioned that the FTC rulemaking record disclosed substantial evidence of this kind of abuse.

Do you know if the FTC brought any individual cases against dealers during recent years under section 5 of the FTC Act? It is a question that Senator Ford touched on earlier today.

Ms. O'KEEFE. I do not have any personal knowledge of the FTC bringing individual actions against dealers under section 5.

Senator KASTEN. If all of the abuses exist as you say they do, wouldn't it make sense that the FTC would have brought at least one or two individual cases over this period of 7 or 8 years when they are supposedly studying this industry?

Ms. O'KEEFE. They may very well have, and I would be glad to find out and supply that information for the record. But the purpose of a rulemaking proceeding is to address pervasive industry practices. The FTC, pursuant to the investigation conducted by the Seattle regional office, found a pervasive practice. And they used section 5 authority with respect to section 18 rulemaking to investigate and to promulgate a rule dealing with those abuses.

Senator KASTEN. The point I'm trying to make is they have a mechanism on the books that they have apparently not used.

Ms. O'KEEFE. I understand that.

Senator KASTEN. Apparently, you believe that a problem with misrepresentation exists, but that the FTC chose not to address it with individual suits.

Would you agree to that, Mr. Montgomery?

Mr. MONTGOMERY. I would like to comment. Although I cannot speak for the FTC, it would be my feeling that suits—certainly appreciable number of suits by the FTC—against the individual used car dealers would always be unlikely because an individual dealer does not generate the volume of business, I think, sufficient to justify the expenditure of resources of the FTC. In addition, it would be extremely inefficient for a Federal agency to take that kind of an individual case-by-case regulatory approach. It would have so little effect on the market.

Senator KASTEN. Are you suggesting with this that they could do something other than approach the problem dealer-by-dealer?

The answer to that is that you're not suggesting that?

Mr. MONTGOMERY. I'm not suggesting that.

I think what they have chosen to do is to exercise rulemaking authority. As a matter of fact, we have at least one Federal court, the 9th Circuit, that last month indicated that perhaps they are required to do so.

For significant enforcement activity, however, of the nature that we are talking about here, actions against used car dealers alleging failure to disclosure defects, you would have to look to State attorneys general. You would, I think, find a significant number of cases—certainly Senator Gorton mentioned this morning one very now-famous case that he brought while he was attorney general of the State of Washington—and we have brought a number of cases in Massachusetts.

And that represents the experience of many, if not most, of the States.

Senator KASTEN. I don't want you to have the argument both ways. You say that there is a problem out there that we cannot deal with, either through the consumer protection laws or other laws, on a State-by-State basis.

And now Senator Gorton has demonstrated that you can deal with them. And you are suggesting that you in Massachusetts are dealing with it.

Mr. MONTGOMERY. What I am suggesting is that we have dealt with it on an individual, case-by-case basis. However, our conclusion still is that a uniform rule is necessary, and that individual, case-by-case adjudication is not going to accomplish the purpose of informing, educating, and protecting the used car-buying public.

Senator KASTEN. You sat here and listened all morning. You are an attorney; I am not. I am a small businessman.

Would you agree that the rule that we have in Wisconsin, which requires an inspection and repairs, is a more workable and more predictable rule than one requiring disclosure of known defects? Do you agree with the testimony that we heard this morning, that there is a big question mark here?

Mr. MONTGOMERY. Certainly. As I stated, we did support a mandatory inspection rule during the FTC's rulemaking procedure. To that extent, I certainly agree that from our point of view it would be preferable.

Senator KASTEN. I do not know whether it is preferable. The legislature is going to decide that. But you can say it is more workable, certainly?

Mr. MONTGOMERY. Yes.

Senator KASTEN. Inspection procedures with repairs is more workable and predictable.

Mr. MONTGOMERY. It discloses more information, and therefore I think it is more workable.

Senator KASTEN. In addition, it is more predictable. In other words, it is easier to define. It is easier to describe whether you did it or did not do it.

Mr. MONTGOMERY. To tell you the truth, I'm really not sure. It seems to me that a mandatory inspection rule does create one particular problem, since it suggests that the dealer has discovered all of the defects which existed in the vehicle at the time it was sold. That seems to me to create a factual and a liability question that might be very troubling.

The FTC rule avoids that problem. It just says that you have to disclose what you know, and then it places the burden on the Commission, on the State attorneys general, and on private consumers to prove that they did in fact know, if they don't disclose it. To some extent, I don't know if it is more workable, although I do agree that it is preferable.

Senator KASTEN. You brought up a moment ago the cost of case-by-case litigation.

I would like to get a sense of the time and effort necessary on the part of a used car dealer to oppose the FTC in court, if the FTC brought a civil penalty action against the dealer. I assume you have been an attorney in private practice, at one time or another in your career, as well. Is that right?

Mr. MONTGOMERY. Yes.

Senator KASTEN. So, what do we figure, just for rough numbers? $100 an hour for attorneys?

Mr. MONTGOMERY. That might be the prevailing rate.

Senator KASTEN. What about other costs?

The loss of the dealer's own time, or the time that he would have to be working with his attorney, or the time away from his business—let's assume it is a small or medium-sized business—how would you measure that?

Mr. MONTGOMERY. It depends on the extent of the problem and the seriousness of the allegations made by the FTC. I certainly cannot come up with a formula by which the committee could quantify the cost to businesses of compliance actions.

Senator KASTEN. In Massachusetts, how long does it take to get a case through the Federal courts?

I am told it's 2½ to 3 years. Is that right?

Mr. MONTGOMERY. Yes. That's the experience in our State courts.

Senator KASTEN. Two and a half to 3 years for an average used car dealer in a small Massachusetts town?

Mr. MONTGOMERY. In a case that is litigated through a trial on the merits to judgment, which of course very few cases are.

Senator KASTEN. And if you were to make an appeal, how long would that be?

Mr. MONTGOMERY. Again, at least another year.

Senator KASTEN. Let me ask you to change hats and be the smalltown lawyer who has just been called up by his used car dealer. The used car dealer says, "I have a case that the FTC is bringing against me for a $10,000 fine."

Wouldn't it be your sense to say, "I don't know whether you are right or wrong. I will spend a couple of minutes looking. But my judgment is, pay the fine and don't try to fight them in court. By the time that we are all the way through it, it is going to cost you more than $10,000 either way."

Mr. MONTGOMERY. There is no question that the cost of litigation—not only litigation against the Federal Government or the State government, but any litigation— imposes a substantial cost. And that cost induces settlement. And I would agree with that.

Senator KASTEN. You, as a smalltown lawyer, would advise, or would be likely to advise, your used car dealer, "I'm sorry. I don't know if you are right or wrong, but my advice to you as your attorney is, don't fight them, just pay the fine"?

Mr. MONTGOMERY. That would depend. I think I would first advise them to check with the dealers association to see if, as a matter of principle, they would like to foot the bill for the cost of the litigation, which is not unusual. But barring that, I might very well advise that settlement ought to be considered.

Senator KASTEN. I would like to thank both of you for your testimony, and also thank you for your patience. We ended up with more Senators and more questions than we thought we were going to have today. I think we ended up with a more interesting hearing, however, with more questions and problems.

So, I thank you for your participation, and I apologize for keeping you later than you expected.

Mr. MONTGOMERY. Thank you.

Ms. O'KEEFE. Thank you.

Senator KASTEN. The record of this hearing will be held open so that members of the subcommittee may submit questions to the witnesses to be answered for the record. I hope those questions can be answered within 2-weeks' time. I would like once again to thank

all of the witnesses for their participation today. The hearing is adjourned.

[Whereupon, at 1:37 p.m., the hearing was adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. HARRISON H. SCHMITT, U.S. SENATOR FROM NEW MEXICO

FEDERAL TRADE COMMISSION—LEGISLATIVE VETO WILL IMPROVE RULEMAKING

It is a pleasure to see the Commerce Committee begin to exercise the authority included in the FTC Improvements Act to review, and possibly overturn, proposed FTC rules. This authority, if properly exercised and not abused, will insure that FTC rules are consistent with the will of the people as expressed through their elected representatives in Congress.

FTC regulations have the full force and effect of law. Under the Magnuson-Moss Act, FTC rules can impose fines of up to $10,000 per day. Such power should not be exercised without appropriate Congressional safeguards.

The legislative veto is an important mechanism for insuring that regulations of the Commission are given careful scrutiny by the Congress before they are proposed and become effective. It has been contended that the normal oversight process of the Committees of Congress that accompanies routine authorization bills is sufficient to insure that agency rulemaking remains under Congressional control. However, in an era when authorization bills are frequently delayed for extended periods, sometimes requiring agencies to be funded through continuing resolutions for years at a time, routine oversight on authorization bills is uncertain at best.

The FTC Improvements Act, passed in 1980, is an excellent case in point. This was the first authorization bill for the FTC since 1977. No general oversight hearings had been conducted on the agency's activities during the intervening three years.

As a result there were a number of controversial rules being developed by the Commission that had never been the subject of Congressional consideration. Many of the industry groups and trade associations affected by these rules were convinced that the Committee should address the issues raised by these rulemaking proposals in the context of the authorization bill, owing to the fact that if the concerned parties waited until the Commission had completely developed rules for final promulgation, there would be no legislative vehicle for the Committee to use in overturning the rule.

Consequently, nearly every rule under consideration by the FTC was made the subject of a full blown lobbying effort. Committee members were deluged with information from supporters and opponents of each proposed regulation. The resulting circus-like atmosphere was hardly conducive to a thoughtful consideration of the pros and cons of each of the proposed regulations. With the necessity of having to analyze more than a dozen issues at once it is my view that the outcome was less than satisfactory.

The existence of a possible legislative veto of proposed FTC rules will avoid a repetition of this unfortunate exercise. This procedure, which provides for Congressional review and possible disapproval of FTC rules at the conclusion of the rulemaking process, will generally insure that the FTC has an opportunity to complete its development of proposed rules before a particular rulemaking effort is considered by the Congress.

Often substantive changes in rules are made before final promulgation; it makes little sense for the Congress to overturn a proposal while it is still in a formulative stage. Yet, in the absence of a legislative veto procedure, it is virtually guaranteed that the periodic FTC authorization bill will become a vehicle for every organization affected by a rule to make an effort to have the Congress block the rule before it becomes effective—and before the FTC has even developed a final proposal. On many occasions it may very well be appropriate for the Congress to overturn FTC rulemakings. It is preferable, however, for this to occur after the provisions of the final proposed rule are known, when the Congress can, in an orderly and systematic procedure, consider the rule in a deliberate manner. The legislative veto will permit this to occur.

In my opinion, the existence of a Congressional review procedure "at the end of the pipeline" will improve the rulemaking process in its entirety. Rather than a

concept that is in some respect anti-regulation, I believe the legislative veto will make for better regulation, which is more responsive to the public, and a more accurate reflection of Congressional intent than has been the case in the past.

STATEMENT OF AMERICAN INTERNATIONAL AUTOMOBILE DEALERS ASSOCIATION

American International Automobile Dealers Association represents 7,000 American dealerships that sell and service imported automobiles, and their 165,000 employees. We appreciate the opportunity to comment on this Trade Regulation Rule which is so important to our membership. Our organization has testified repeatedly before the FTC on the subject of the Rule since the FTC staff investigations began in the mid-1970's.

American International Automobile Dealers Association supports Senate Concurrent Resolution 33 (and the House of Representatives Concurrent Resolution 178) which requests the Congress disapprove the final rule promulgated by the Federal Trade Commission dealing with the matter of the trade regulation rule relating to the sale of used motor vehicles, which was submitted to the Congress on September 10, 1981.

It is the position of American International Automobile Dealers Association that the final Trade Regulation Rule to regulate the sale of used motor vehicles creates confusion for both the automobile dealer and the consumer by the ambiguous language of the Rule in which the dealer is required to disclose known defects on a window sticker although he is not required to inspect the vehicle. It is virtually impossible for a dealer to comply with the contradictory language of the Rule. It will increase the burden upon our Judicial system when the courts are called upon to resolve inevitable conflicts the Rule will create. This regulation will increase the cost of used vehicle sales by automobile dealers and ultimately force many automobile dealers out of the used car business.

More than half the sales of used motor vehicles in the United States each year are transactions between private individuals who will not be subject to the requirements of the regulation. The Rule puts the small businessman, who invests thousands of dollars in his business, in a position where he will be unable to compete successfully with the unregulated private party seller.

Only through vehicle inspection would it be possible for an automobile dealer to disclose defects in a used motor vehicle. Failure to comply with the Rule would subject the dealer to a fine of up to $10,000 if he fails to disclose certain material defects in the condition of the used vehicle "known" to the dealer.

There is a serious legal question whether Congress intended to delegate authority to the FTC to mandate inspections of used cars. Under the Magnuson-Moss Act, the Congress directed the Federal Trade Commission to initiate a rulemaking proceeding dealing with warranties. Additional views included in the Commerce Committee report which accompanied the bill clearly directed the Commission that Congress never intended to give the Commission authority under the provisions of Public Law 93-637 to require inspections of vehicles or to require that any used motor vehicle or any of its components be warranted.

There is a further question whether the FTC has the authority under Section 5 of the FTC Act to mandate inspections and the disclosure of inspection results. Market changes such as those required by the final Used Car Trade Regulation Rule are not authorized under this act which directs the FTC to challenge unfair and deceptive acts and practices.

Former Chairman of the FTC, Robert Pitofsky, stated to the Commission on October 11, 1979, that this rule could impose costs on industry and consumers that dwarf the costs imposed in other Commission rulemakings and it is crucial to determine whether the likely results achieved are worth it. He was also concerned that the Rule would have the effect of undermining existing techniques in the market to which consumers resort to protect their interests. "I have in mind the growing market for the sale of warranties and also the practice of many consumers of taking a used car to an independent mechanic for a pre-purchase inspection. Both these techniques may be a more reliable form of consumer protection than the staff proposals and yet they may be less likely to occur if the Commission approves the proposed rule."

AIADA could support the portion of the proposed window form which would require the disclosure of the terms of the warranties. We agree that the consumer would find such information useful and a protection against the occasional unethical seller who overstates warranty protection. By knowing and understanding the precise terms of the warranties which are available, consumers can bargain for

adequate warranty protection. Consumers will understand what is meant to be an "as is" sale.

The Rule will result in an increase of "as is" sales by automobile dealers which will deprive consumers of the protection they are currently being offered through warranties and other guarantees. AIADA believes that an optional 30-day warranty on parts and labor is far more advantageous to consumers than defect disclosure. It offers market incentives to sellers of used cars to inspect their vehicles and repair them before selling them under such a warranty.

The Rule would be difficult to enforce and imposes greater burdens on honest automobile dealers who wish to comply with the law, than it does upon the few dishonest sellers who will find ways to circumvent the regulation. Dealers can be cheated by dishonest persons who mask defects in their cars during a trade-in, while imposing the full burden of compliance with the Rule upon the automobile dealer.

It is inconsistent with protecting the rights of the consumer to apply the Rule exclusively to automobile dealers while the majority of used car sales, which are private party sales, remain unregulated. These private parties would be far more likely to deceive the consumer for they have no business reputation to protect, and, therefore, less incentive to be honest.

The inclusion of private sales would add hundreds of thousands to the number affected by the Rule (and, potentially at least, in opposition to it). The FTC staff claim that private sales should not be included because consumers are more likely to receive defect information from a private individual than from a dealer cannot be supported by the record. This contradicts the experience of anyone who has purchased a used car in the private market. Most private individuals know little about the automobile they are selling and less about the specific defects.

The rulemaking record supports a warranty disclosure requirement that would be applied to all used car sales, whether by dealers or between individuals. The disclosure on the window form of the terms of the warranty and the limitation of an "as is" sale would be valuable information for the used car buyer. Forty to fifty percent of used cars are presently sold with a 30-day warranty which permits the buyer to return to the seller for service which is far more beneficial to the consumer than the requirement that used car dealers reveal known defects. Testimony by imported car dealers before the FTC revealed that the great majority of used cars sold by these franchised dealers are retailed under such a warranty. Enforcement of the FTC Used Car Rule probably would remove this consumer protection from many of these sales since dealers would be forced to make such sales "as is" in order to protect themselves from prolonged and expensive litigation.

Statement of American Car Rental Association

These comments are submitted by the American Car Rental Association (ACRA) to the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation in support of the resolution disapproving the FTC Used Car Rule.

ACRA is a trade association comprised of more than 1,500 companies who rent and lease automobiles. ACRA's members range from small local companies to the larger nationally recognizable firms such as Avis, Budget, National, Thrifty, American International and Holiday Rent-A-Car International. ACRA[1] has participated actively in the FTC Used Car proceedings since their inception in 1976. Although ACRA opposed and continues to oppose the promulgation of any rule which exceeds the mandated requirements of full disclosure of warranty terms as set forth in the Magnuson/Moss Warranty FTC Improvement Act, ACRA and its individual members neither condone nor seek to perpetuate practices in the used car sales market which are misleading to consumers or dishonest. The present rule submitted to the Congress provides for disclosure of any warranties given by a used car dealer and the nature of those warranties. ACRA has no objection to the warranty disclosure provisions of the proposed rule. Indeed ACRA maintains that such warranty disclosure provision totally fulfills the mandate expressed by Congress in the Magnuson/Moss Act.

While ACRA believes that the motives and intent of the FTC in promulgating this rule were directed toward eliminating dishonest practices in the marketplace and supports those goals, its members have serious reservations as to whether the defect disclosure provisions of the promulgated rule and "Used Car Buyers Guide" will provide buyers with additional useful information about the condition of used cars

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[1] ACRA is the successor to the Car & Truck Renting and Leasing Association, representing the interests of the daily car rental industry which was a designated industry representative throughout the proceedings conducted by the FTC.

sold by dealers. Although there may be some dishonest dealing in the used car industry, millions of used cars are sold each year to satisfied buyers by honest, reputable dealers. The voluminous record developed by the FTC hearings does not support a conclusion that dishonest or unfair dealing is either pervasive or prevalent in the industry.

In its statement of basis for the rule, the FTC concludes that the record of the proceeding establishes "substantial evidence of deceptive acts and practices in connection with the sale of used cars." Without suggesting that the industry is totally free from deceptive practices by some dealers, ACRA submits that the record indicates such practices are confirmed to a small minority of dealers. Branding most used car dealers as dishonest gives credence to a caricature created by Hollywood, which has been perpetuated by the media and bears little relationship to reality. Indeed such a label has the same validity and credibility as branding all politicians or lawyers as dishonest. Yet the FTC's basis for the rule perpetuates this myth and in so doing does a gross disservice to the industry. The FTC conclusions are predicated upon the testimony developed at a series of hearings attended by consumer witnesses who were solicited by the FTC staff and had been asked to testify because they had personally experienced problems associated with the purchase of a used car. The hearings documented complaints of several disgruntled buyers. However, the FTC asserts that in 1979 alone, 18.5 million used cars were sold. Nevertheless, with little or no empirical support the FTC draws the conclusion that the hearing record supports a finding of "substantial" evidence of deceptive practices. ACRA is of the opinion the record before the FTC does not support a conclusion that deceptive practices are pervasive in the industry. In essence the FTC prepared a statement of basis and purpose for the used car rule which indicates they canvassed those buyers who believed they were dealt with dishonestly by used car dealers, and based upon the testimony of those unhappy buyers the FTC concludes dishonesty is the rule rather than the exception in the marketplace. This is unwarranted bootstrap reasoning and pure sophistry. There are undeniably some dishonest used car dealers. The question left unanswered by five years of investigation, hearings, and written comments is the extent of dishonest practices and whether they are of sufficient magnitude to justify a rule. One can search the record in vain for a definitive answer to this basic question.

The hearings clearly established that the majority of complaints voiced at the hearings by disgruntled buyers solicited by the FTC and representatives of consumer groups and legal aid bureaus arose out of the sale of relatively old, high mileage, low priced used cars. The overwhelming majority of the complaints and the central theme of the testimony of the consumer representatives related to oral pre-sale statements by dealers about the respective responsibilities of the dealer and the buyer if post-sale repairs were necessary—namely warranty coverage and the terms of any warranty. Oral pre-sale representations of dealers were alleged to be frequently inconsistent with the terms of the sales contract. Despite those allegations there is scant testimony on the record to support a conclusion that many vehicles were sold with safety related defects which thereafter resulted in accidents.

The warranty disclosure provisions of the rule as promulgated should remedy the major complaint developed by the trade rule proceedings. By requiring the posting of the terms of any warranty on each used vehicle offered for sale, the FTC has taken a giant step toward curing the major complaint of viturally every consumer witness—the dealer not living up to his oral promises. In addition to responding to the primary concerns of the consumer groups testifying before the FTC, in ACRA's opinion, the posting of information relating to type and terms of warranty coverage completely fulfills the congressional mandate of the Magnuson/Moss Act.

The rule in its present form, however, goes beyond the legislative intendment of Congress by requiring each dealer to list major defects known to the dealer and establishing criteria and standards for measuring and determining "major defects". The provision of the rule establishing defect standards and criteria will undermine the underlying purpose of the rule, which is an attempt to encourage dealers to examine vehicles offered for sale, make needed repairs and offer some type of full or limited warranty. All too often over the recent years, by over-regulation or by confusing regulations, government agencies have unwittingly discouraged honest dealing by increasing the costs of doing business without either any significant concomitant benefit or deterring the questionable practices of those to whom the regulations are primarily directed.

Throughout the tortured history of this rule, the FTC staff has endeavored to include a provision compelling dealers to inspect and thereby warrant every used car sold at retail. The Magnuson/Moss Act in unambiguous language expressly directs the FTC not to establish any rule which would require a dealer to give a warranty, or by its own language create a warranty. In apparent recognition of the

limitations on their authority as granted by Congress, the FTC modified the rule by initially removing the mandatory inspection provisions and thereafter removing an optional inspection provision. However, the rule in its present form includes an inspection protocol for determining major defects which will unquestionably create a warranty if a dealer undertakes to inspect a vehicle he offers for sale. This provision is clearly contrary to the clear intent of Magnuson/Moss.

Because the Buyers Guide is expressly made a part of the contract of sale, contractual obligations on the part of the dealer are created which are predicated upon vague defect definitional language that will be difficult to apply and equally difficult to enforce. The dealers will be forced into a contractual arrangement which was thrust upon them without any opportunity for careful evaluation and comment.

ACRA is not suggesting dealers should be encouraged or indeed authorized to sell used vehicles with known defects. Disclosure of known defects is a salutory concept which ACRA does not oppose. ACRA's opposition to the rule in its present form goes to the "defect inspection" protocol and standards and the manner in which these standards were developed. The defect disclosure section (§ 455.6) of the rule was hastily drawn, and ill conceived, with neither the industry nor interested consumer groups being afforded an opportunity to comment on what is obviously a critical provision of the rule.

ACRA is of the opinion the standards created by § 455.6 of the rule are onerous and unworkable. Rather than encouraging dealers to inspect the vehicles they offer for sale, the "inspection" protocol will encourage dealers to deliberately remain ignorant of the condition of used vehicles they offer for sale and deliberately avoid a careful inspection.

The rationale for this opinion is neither complex nor academic. Section 455.6 of the Rule establishes major known defect standards. Some of the standards are so imprecise as to create more problems than they attempt to solve. Other testing standards will require expensive testing procedures and equipment which will outweigh any potential benefit and dissuade dealers from attempting to comply with them.

In addition to the confusion which will result from the imprecise defect standards, ACRA has grave concern that the defect disclosure provision of the rule will mislead the buying public by creating false expectations and frustrations which can only lead to unnecessary and costly litigation.

THE VAGUE DEFINITIONS OF CERTAIN DEFECTS AND THE ONEROUS STANDARDS TO DETERMINE OTHER DEFECTS WILL ENCOURAGE DEALERS TO DELIBERATELY AVOID DISCOVERING THE CONDITION OF THEIR VEHICLES

The intent of the FTC to encourage honesty and fair dealing in the used car marketplace will be undermined by the defect disclosure provision in the rule, to the detriment of buyers and dealers. Regulations which are vague or onerous are more harmful than no regulations. Fundamental fairness for all parties requires regulations and laws be sufficiently clear for the average person to interpret their meaning.

Section 455.6 of the rule gives a dealer two options. Under one option a dealer can elect not to inspect a vehicle. If the dealer has not received knowledge of or does not observe any listed defect, he can indicate "no known major defect". Under the second option, if a dealer elects to inspect the vehicle he must comply with the standards set forth in Sections 455.6 (a) through (n). Upon embarking on the inspection route, the dealer begins a dangerous journey into the land of the undefinable. Under the second option he must determine among other tests, whether there is "abnormal exhaust discharge" (§ 455.6(b)(5)); "abnormal noise or vibration in the transmission and drive shaft" (§ 455.6(d)(3)); and "abnormal noise or vibration caused by a faulty differential" (§ 455.6(d)(3)). These are vague subjective terms, non-measurable by any objective testing procedures. What is "abnormal" exhaust or "abnormal" noise and vibration? Is "abnormal" for a one year old car with 15,000 miles, "normal" for a six year old car with 80,000 miles? The FTC requires a dealer to apply such imprecise standards to all cars regardless of age or mileage. Assume a dealer checks a vehicle and determines it has no major defects. Three weeks after the sale the buyer returns to the dealer and indicates a mechanic or friend believes the transmission is abnormally noisy and he wants it fixed. The dealer's mechanic disagrees and the dispute is litigated. A court or arbitrator will then be called upon to resolve whether the noise is "abnormal" and whether such noise was "abnormal" at the time of sale, which may have occurred many months earlier. The chaos such imprecise standards will create is obvious.

While the "abnormal" defect standards are patently vague and non-measureable, other standards such as the inspection protocol for testing the integrity of the brake

system and steering under Sections 455.6 (j) and (k) respectively, will require testing facilities and equipment usually found in training schools or testing laboratories. The FTC standards go from one extreme to the other. Many dealers, especially those who are not new car dealers, do not have the equipment or capital to buy the equipment needed to perform the tests required by Sections 455.6 (j), (k) and (n). For example a small dealer in a rural or suburban area may be effectively precluded from testing a vehicle's brakes under the standards of § 455.6(j) because he neither owns nor has ready access to the testing equipment.

Thus, honest dealers may face the choice of not giving their vehicles more than a cursory viewing, thereby permitting them to state "no known major defects" or carefully checking the vehicle and exposing themselves to charges by the FTC or litigation filed by over zealous lawyers simply because of the vague and unworkable inspection standards mandated by the rule. Honest dealers will likely choose to minimize their liability exposure and seek refuge in calculated ignorance about the condition of the cars they retail. As a result, instead of encouraging dealers to inspect their vehicles, make needed repairs and offer warranties, the rule will have the opposite effect and encourage more "as is" sales—clearly the antithesis of the desired result.

While some of the inspection procedures are reasonable and require only a visual inspection by a knowledgeable mechanic, a number of the testing procedures will create confusion because of their vagueness. Therefore, a dealer who undertakes a thorough examination of a vehicle to determine major defects will enter a minefield of potential litigation. Under the rule a dealer bears the responsibility for certifying a vehicle against either vague or onerous standards that exceed most if not every state safety inspection standards. By way of illustration, one does not need mechanical experience to view with concern the test for shock absorbers. § 455.6(1)(8) states: "Make sure the vehicle does not rock freely more than two cycles by pushing down on one end the vehicle, releasing and counting the cycles". This "bounce" test may be adequate for the weekend mechanic, but will a court look with favor on the task of resolving whether the dealer's mechanic or the buyer's mechanic can get more bounce to the ounce of force. A dealer's attempt to comply with such vague language may unjustly cause him to be charged with an unfair trade practice.

THE KNOWN DEFECT DISCLOSURE PROVISION OF THE RULE WILL DECEIVE AND FRUSTRATE BUYERS OF USED CARS IN CONTRAVENTION OF THE INTENT OF CONGRESS

ACRA urges Congress to send the rule back to the FTC because in its present form the rule will mislead the buying public by giving a buyer a false sense of security and thereby frustrating the purchaser's expectations with respect to the car. We ask the Committee to carefully consider the situation of a statement on the Buyers Guide by a dealer that there are no known defects.

Such a statement by the dealer can only mean one of two things:

1. The dealer has not examined the car and therefore he knows of no major defects, but the car may in fact have one or more major defects; or
2. The dealer has examined the car and after a careful inspection finds no major defects.

Whichever of the two bases prompted the finding of "no major defects" the Buyers Guide offers absolutely no explanation or basis for the dealer's statement. Now let us examine the Buyer's Guide through the eyes of a buyer or prospective buyer of the used car. What will be the buyer's understanding or expectations with respect to a statement of no major defects known to the dealer? ACRA believes that the average buyer will interpret such a statement to mean that the dealer has inspected the vehicle and there are no major defects known to the dealer. Such a conclusion by a buyer is certainly justified, but may well be completely erroneous. A dealer under the rule can properly state he knows of no major defects if he has not inspected the vehicle, when in fact the vehicle may indeed have a listed defect. The result is all too obvious. If the buyer, following purchase, discovers a defect in the vehicle and is told by the dealer that the statement "no known major defect" was made because no inspection had been performed on the car, the buyer will feel misled and frustrated. The dealer having properly complied with the rule may nevertheless be sued by a disappointed and frustrated buyer. Thus, the good intentions of the FTC may cause the buying public to feel deceived when in fact the dealer merely complied with and ill conceived provision of the rule. ACRA cannot support a provision of a rule which will mislead the consumer, and encourage false expectations. It will also assuredly foster law suits by disappointed buyers. As noted above, this provision of the rule was never subjected to the hearing process. Conceived in haste, dealers and buyers may be the victims who repent in leisure.

ACRA has attempted to highlight only a few of the problems it believes will be created by the existing inspection standards. What is "normal" or "abnormal" will clearly cause problems for buyers, dealers, mechanics and the courts. We live in a litigous society and the defect standards of this rule will, in our view, generate even more private litigation. It cannot be seriously denied that if a dealer inspects a vehicle and indicates on the Buyer's Guide "no known defects", he has created an enforceable warranty under the Uniform Commercial Code. Because the Buyer's Guide is incorporated into the contract of sale, buyers will assuredly bring private suits against dealers. If this occurs, any lack of uniformity in the application of the rule by courts of different states will work to the detriment of both buyers and dealers. Instead of affording protection to buyers, the rule will cause them to become victims of a game of chance—a result certainly not intended by Congress or the FTC, and not desired by the industry.

The used car industry uniformly agrees that the FTC rule in its present form will increase the retail price of used cars. There is no evidence in the record to provide any guidance on the extent of such increase in price. Clearly a dealer's decision to inspect a vehicle will affect whether the cost of the inspection will be added to the price of the vehicle. Any costs associated with the rule, be it the cost of defect inspection, the cost of preparing the Buyer's Guide sticker, or the cost of anticipated litigation, will result in an increase in the price of used cars. Whether the amount of such increase is $5 or $200 per vehicle, the aggregate cost to the buying public will be onerous without any significant benefit flowing to the buyer. Congress cannot lose sight of the ripple effect of any increase in the price of cars sold by dealers. It is estimated that more than 50 percent of all used car sales are between private parties. The benchmark for both dealer and private sales is the so-called "blue book" prices established by dealer sales. Thus, any increase in the retail price of cars sold by dealers caused by the rule will result in an upward trend in the price of all used cars offered for sale.

ACRA is compelled to note that it is a sad commentary on the rule making process when an agency regulates a multibillion dollar industry involving the annual sale of more than 10 million vehicles, without giving the members of that industry or the buying public an opportunity to comment on a significant provision of the regulations. The FTC may state to the contrary, but the fact remains that the rule in the form it is being presented to the Congress, contains a defect disclosure provision and inspection protocol which has never been subjected to the hearing or comment process. This subcommittee is the first forum affording the industry and buying public an opportunity to present their comments on the rule promulgated on August 14, 1981. ACRA appreciates this opportunity and strongly recommends Congress send the rule in its present form back to the FTC with directions to reexamine those provisions that relate to defect disclosure and either remove the provisions entirely or develop language that will establish reasonable, effective standards for dealer evaluation that will encourage rather than discourage compliance with the rule.

STATEMENT OF BRUCE C. RATNER, COMMISSIONER, NEW YORK CITY DEPARTMENT OF CONSUMER AFFAIRS

On behalf of the New York City Department of Consumer Affairs, I urge the members of this Committee to oppose Senate Concurrent Resolution 33, which would override the Federal Trade Commission's rule concerning the sale of used motor vehicles. An undercover study conducted by the Department of Consumer Affairs shows that misrepresentation and equivocation regarding vehicle mechanical condition are distressingly common practices. The FTC rule currently before Congress would help eliminate these problems by requiring dealers to post a "Buyer's Guide" on the window of each vehicle offered for sale, disclosing known mechanical defects and providing plain-language information about warranty coverage. Such disclosures would minimize oral misrepresentations without placing an expensive or unwieldy regulatory burden on dealers.

The enactment of the FTC rule becomes more imperative as the used car industry expands. Tight budgets and the soaring cost of new cars have compelled more and more people to depend on used cars as their primary form of transportation. In 1980, Americans spent $70.8 billion on 27.425 million used cars, over 1 million more than they purchased in 1979.[1]

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[1] Hertz Corporation study of the nation's 1980 used car sales.

Mechanical defects, both major and minor, are common in used cars. Every year, the Department of Consumer Affairs receives hundreds of complaints from consumers who find themselves burdened with costly repair bills shortly after they purchase a used car. Moreover, consumers who do complain represent only a fraction of the numnber of people who have this experience. A 1975 study conducted by the Center of Study for Responsive Law found that consumers fail to complain about problems in what they purchase 66% of the time.[2]

A Department of Consumer Affairs' investigation conducted in 1979 also demonstrates that used cars are often riddled with defects. Of twelve randomly chosen cars used in this study, not one was free from defects. In fact, tests run at an electronic diagnostic center revealed a staggering total of 242 defects in the twelve cars inspected.

It is crucial for consumers to be aware of a car's defects *before* they buy for several reasons.

First, major defects unknown at the time of purchase can mean hundreds of dollars in unanticipated repair bills later on. Diagnostic tests on the 12 cars in the Department investigation revealed potential repair bills ranging from $150 to $650, with an average of $400. Low and middle income people operating on tight budgets may be unable to meet these high unanticipated expenses. It is therefore especially important that used car buyers have an idea of the true cost of a vehicle before they purchase it; i.e., retail cost. *plus* potential repair costs.

Second, consumers should know of lesser defects when they buy a used car. Problems with alignment and wheel balancing, for example, can lead to expensive major repairs if they go uncorrected.

Third, repairs mean that a consumer is deprived of the use of his or her newly purchased vehicle. A vehicle that spends time in the repair shop may mean that the owner is forced to pay for public transportation or car rental. Missed appointments and lost wages can also result.

Fourth, and perhaps most importantly, unknown defects are not only expensive and inconvenient, they are dangerous to the public, as well as to the driver and his or her passengers.

Information about defects is also important because most consumers are not mechanically knowledgable. When considering the purchase of a used car, potential buyers must assume that dealers will disclose the defects of which they are aware. Unfortunately, the evidence indicates that dealers are not always frank in their disclosures. In the cases studied in the Department of Consumer Affairs' undercover investigation, all the salesman were cognizant of the mechanical condition of the car selected for study, but most of them grossly understated defects to investigators posing as prospective buyers.

The Department of Consumer Affairs' 1979 Used Car Study consists of twelve test cases. For each case, an investigator posing as a prospective buyer expressed interest in purchasing a randomly selected car, and arranged with the salesman to take it to an electronic diagnostic center. After the inspection, the investigator returned the car and went over the test results with the salesman, showing him the test report and discussing the particular defects in the car. Later the same day, another investigator approached the salesman who had seen the diagnostic test results and expressed interest in the same car. The second investigator asked both general and specific questions about the car's condition.[3]

Of the eleven cases where the salesmen who had seen the diagnostic report was approached, only two salesmen were frank about defects. It is significant that these two cases involved cars that were in substantially better condition than any of the others. In nine of the cases, the salesmen failed to disclose major defects that had been shown to them just a few hours earlier. While in three of these cases the salesmen did discuss obvious, minor defects (a damaged tail pipe, for example), these small disclosures may even contribute to the potential buyer's misconceptions. The buyer may be given the impression that the salesman is honestly discussing flaws, while in fact information regarding major defects remains undisclosed.

Our study confirms the fact that used car buyers are frequently the victims of product misrepresentation. The FTC rule currently before Congress would help provide consumers with the information they need to meet this problem.

First, the requirement that dealers disclose all known defects should encourage salesmen to be more open about defects than our study found them to be. The

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[2] Arthur Best, When Consumers Complain, (New York: Columbia University Press, 1981), ρ. 134.

[3] One case was dropped because the second investigator could not locate the salesman who was shown the diagnostic test results.

threat of fines up to $10,000 would certainly act as a deterrent to misrepresentations.

Second, full and clear disclosure of warranty rights would prevent buyers from having false expectations about the dealer's responsibility to repair a car after purchase. The warranty disclosure rule could also improve the overall quality of used cars in the marketplace. If dealers must clearly disclose warranty coverage, they could be encouraged to put their cars in better working order before offering them for sale. As dealers with better cars can give more extensive warranties, consumer awareness of warranty conditions will mean that those dealers who sell the better products will gain the competitive advantage they deserve.

Third, the Buyer's Guide would also suggest that the potential buyer ask whether a pre-purchase inspection may be conducted by an independent mechanic. Pre-purchase inspections free consumers from exclusive dependence on dealer representations regarding the mechanical condition of the car. Pre-purchase inspection would also discourage dealers from making claims that could be disproved.

Finally, the warning to have all dealer promises put in writing which appears on the Buyer's Guide is another protection against dealer misrepresentation. Dealers would pause before putting unsubstantiated claims in writing because such documents could be used against them if a dispute should arise after the sale.

In closing, I would like to repeat that the FTC rule would be a great help to this nation's many used car buyers in that it would combat the high incidence of oral misrepresentation in the used car industry. The FTC rule does not require dealers to conduct inspections, or to provide information that they do not already have. It is not an overprotective or meddlesome rule. It merely requires that consumers be given the basic information they need to buy cars that are both safe and mechanically sound.

OREGON INDEPENDENT AUTO DEALERS ASSOCIATION,
Salem, Oreg., September 25, 1981.

Hon. BOB PACKWOOD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PACKWOOD: Senator Larry Pressler has introduced Senate Concurrent Resolution 33 to disapprove the recent FTC Used Car Trade Rule. This Rule is extremely damaging to the small businessman trying to keep his used car business going and the Rule will add untold costs to the consumer buying a car.

I was Administrator of the Oregon Consumer Services Division in 1973 when the Federal Trade Commission first decided there was a problem. Our files didn't bear out their contentions and I refused to appear at their hearing in Seattle and testify. Since that time they have harrassed the industry with a series of hearings and proposals that have ignored Congressional instructions and would complicate any understanding of the already incomprehensible Magnuson-Moss Act. And the promulgator of this campaign is the author of that act, which has had the overall effect of taking warranty rights way from the consumer.

FTC has never performed a cost-benefit study or proven that oral misrepresentations are a problem. Only 243 consumers favor the proposal, rather insignificant when there were 189,000,000 auto sales the last seven years. We now have 4000 fewer used car dealers and 2000 fewer new car dealers and many dealers allege they will not fight the possible legal ramifications of listing "known defects"—they will close their doors and seek another means of earning a living.

Presently nearly 60% of the cars are sold by private parties—unlicensed and unbonded—leaving the customer without any recourse to consumer protection agencies. Legal redress is expensive so the buyer swallows his loss and the seller gets away scot free.

Dealers in Oregon are licensed, have a $15,000 bond and are monitored by the Motor Vehicle Division, Consumer Protection and our office as far as our nearly 300 members are concerned.

Please look at this Resolution, give it your sponsorship and your vote. We don't need more unnecessary regulation of our struggling small businessman.

I would be delighted to visit with you about this Resolution and the details of the FTC rule when you are next in Oregon. Thank you for your help.

Sincerely,

WANDA MERRILL-WAHUS,
Executive Director.

NATIONAL AUTO AUCTION ASSOCIATION, INC.,
Lincoln, Nebr., October 19, 1981.

DEAR SENATOR: In a regular scheduled meeting, October 2, 1981, the Board of Directors of the National Auto Auction Association passed, by unanimous vote, the following Resolution:

Whereas the NAAA has reviewed the Used Car Trade Rule promulgated by the Federal Trade Commission (FTC), and

Whereas the NAAA believes this rule should be vetoed by Congress for the following reasons:

1. It does not conform with the stated congressional intent prohibiting any provision that would directly or indirectly require an inspection of the vehicle.
2. It will impose millions of dollars unnecessary and additional expense on the ultimate consumers.
3. It will seriously threaten the financial stability and viability of all automobile dealers.
4. The rule is ambiguous and vague in many items and will force expenditures of untold money and time to litigate.
5. It imposes unlimited implied liability risks on all automobile dealers.

For these reasons and others the NAAA petitions the Congress of the United States: that the Senate co-sponsor and vote disapproval of the FTC Trade Rule as outlined in Resolution 33, presented to the Senate by Senator Larry Pressler,

And that the House of Representatives co-sponsor and vote disapproval of the FTC Trade Rule as outlined in Resolution 178, presented to the House by Congressman Gary Lee.

Respectfully submitted,

BERNARD HART,
Executive Secretary, Board of Directors.

GENEVA COLLEGE,
Beaver Falls, Pa., October 26, 1981.

Senator BOB KASTEN,
Senate Committee on Commerce, Science, and Transportation, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR KASTEN: I am writing in opposition to S. Con. Res. 33, a resolution to disapprove the Federal Trade Commission trade regulation rule relating to the sale of used motor vehicles.

I am writing as a concerned consumer advocate and consumer educator. I have been involved in the consumer area for over a quarter of a century. I have testified a number of times on consumer issues, co-authored a college text, ECONOMICS FOR CONSUMERS, by Gordon and Lee, Seventh Edition, 1977, D. Van Nostrand. In addition I served on the President's Consumer Advisory Council for seven years, 1970–77, and chaired the Council the last two years. I give you this information to show my background and concern as I share with you my recommendations concerning this proposal.

Under the present administration, which is calling for less regulation of business, there is going to be a greater need of information for consumers. This trade regulation is a needed step in that direction. Basically all it is asking for is an honest and open marketplace. Is this too much to ask for? The basic point, it seems to me, is whether we want the law of the jungle to prevail in the marketplace, or whether we want forthrightness and honesty and information which will be helpful to consumers and create no real problem for business.

Would you like to have this information available to members of your family if and when they go out to buy a used car? I certainly would.

I would appreciate it if this comment be made part of the record and a copy of the hearing sent to me. Thanks for your consideration of these comments.

Sincerely,

STEWART M. LEE, *Chairman,*
Department of Economics and Business Administration.

CONSUMERS UNION,
Washington, D.C., October 28, 1981.

Hon. ROBERT KASTEN, Jr.,
Chairman, Consumer Subcommittee, Committee on Commerce, Science, and Transportation Russell Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Consumers Union urges you to oppose S. Con. Res. 33, the resolution to veto the Federal Trade Commission's Used Car Rule. Consumers need and want the protection that the disclosures required by this Rule would offer from abuses which the industry itself admits exist in the sale of used cars.

You have heard from industry interests that the Rule's requirement for dealers to disclose known defects of a used car is unreasonable, vague and burdensome to used car dealers. Would you be surprised to learn that such a disclosure requirement was specifically endorsed by one of the dealer associations now seeking its veto—the National Independent Auto Dealers Association—in comments submitted for the FTC rulemaking record?

In fact, the FTC watered down the final version of the Rule in response to industry and Congressional pressure, abandoning a proposed requirement for dealer inspection in favor of the NIADA-endorsed proposal to disclose known defects. The question in your mind should not be whether the Rule is too onerous but whether it is strong enough to have an impact on the disparity between a dealer's and a prospective customer's knowledge about the condition of a used car.

The industry representatives who have contacted you or your staff want you to believe that a dealer knows little about a used car and would have to submit each car for state inspection, despite the Rule's explicit provision to the contrary, in order to assure compliance with the Rule. This is not the fact.

The FTC rulemaking record is replete with evidence that dealers know a great deal about the condition of the cars they offer for sale. They must, in order to maximize their profit on resale. In fact, dealers who purchase cars at auction for resale have return privileges based on inspection or a test drive. And dealers learn more about cars as they "prep" or "detail" them for sale by touching up noticeable defects. Industry representatives who suggest that a dealer know no more than the ordinary person about the condition of a particular car are asking you to believe that dealers do not act rationally in their own best economic interest.

I am enclosing a copy of a syndicated column by Tom Braden which appeared in newspapers around the nation almost three years ago. It informs consumers why an FTC used car information disclosure rule is a good idea, whatever the reader's views about regulation may be.

Used-car transactions are a primary source of consumer complaints to state and local consumer protection offices around the country. The FTC rulemaking record extensively documents widespread abuse. Consumers care about this problem. I hope that after hearing testimony before the Consumer Subcommittee this Friday you will agree that this minimal FTC disclosure requirement is at least worth trying in view of the clear problem consumers face when they look for a fair deal in the used-car market.

Sincerely,

MARK SILBERGELD,
Director, Washington Office.

Enclosure.

[From the Washington Post, Jan. 27, 1979]

AN END TO USED-CAR JOKES

(By Tom Braden)

The Federal Trade Commission is proposing a new regulation that will do away with those stale jokes about used-car salesmen. It would ensure that all used-car sales are honest. Honest—or else. We might suppose there would be little opposition.

But the proposed regulation is being met with screams of outrage about government interference with business and government-imposed paperwork.

In fact, there isn't much paperwork. In the state of Wisconsin, which has enacted the regulation into law, two-thirds of the dealers say the paperwork takes about 15 minutes.

But the paperwork reflects perhaps as much as another hour of time. For it requires a used-car dealer to check the car he is trying to sell you. Here is what the paper work entails:

Each used car in each used-car lot bears a form consisting of 14 boxes that the dealer is required to check. Box 1, for example, bears the word, "Motor" and a place for the dealer to check it as "OK" or "Not OK."

If the dealer has checked the box as "OK," he must have answered "No" to eight questions on the back of the form. So let's turn the piece of paper around and look at the back.

It starts with that same word "Motor." The dealer has answered "No" to the printed question, "Does it leak oil?" and "No" to the question, "Does it throw blue smoke?" Again, "No" to the question, "Is the block cracked?"

Now turn the form and over again. Look at the next box. It is opposite the word "Brakes." If the dealer has checked "OK" to the word "Brakes," you can look on the back of the form again and see that he has answered satisfactorily a number of questions about those brakes.

So it is not really all that difficult. It requires every used-car dealer to do what most used-car dealers already do. Except that when you get the car home and find out that the block is cracked or that the brakes don't work, you have a provable correction to be made or, if necessary, an excellent lawsuit.

Which is not what you have now. Because many used-car sales are made verbally. When you come back to the salesman and say, "You told me that block wasn't cracked," he can always deny that he promised you a rose garden.

It is too bad that in this once-upon-a-time society of tinkerers, many of us don't know enough so we can buy a used car. But it's a fact. Some of us don't even know the difference between an ignition and a generator. We buy our used cars for the paint jobs. But we buy them, nevertheless, by the billions of dollars each year.

So we can use some protection. And in many towns, one rotten apple can spoil the barrel. Confronted by a dishonest used-car dealer in the lot across the street, the honest dealer has only one choice. He can go dishonest or he can go broke.

So what if the paperwork and the inspection add $15 to the price of your next used car? That's the estimated additional cost in Wisconsin. Think of what you're getting for $15.

Even if you're one who believes that a government regulation is an interference with the free-enterprise system. In that event, you would probably agree with what you were taught in Economics I: The free-enterprise system functions inefficiently whenever (a) the quality of the product varies, and (b) one party to the transaction knows more about the quality of the product than the other party.

So I'm in favor of this regulation. In the used-car market, it would make free enterprise fair.

UNITED STATES CONSUMERS ASSOCIATION,
Washington, D.C., November 9, 1981.

Senator ROBERT KASTEN,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: I am writing you as President of the over 50,000 members of the United States Consumers Association. USCA opposes the proposed resolution to disapprove the Federal Trade Commission's trade regulation rule relating to the sale of used motor vehicles.

Today, more than ever, American consumers are turning to used cars as their primary source of transportation (over 18 million used autos were sold in 1980). As a result, the government is obliged to offer certain safeguards to ensure that consumers' rights are not being violated.

The proposed rule will require dealers to post all known defects about the vehicle; and to include any available warranties with the purchase of the used car. Since this required information is already in the dealers possession, the cost for providing the information is minimal. However, the benefits to millions of prospective buyers are innumerable.

What is at stake here is the consumer's right to product information. It is unthinkable to believe that anyone could make a responsible purchasing decision without all the facts. In order to guarantee consumers their right to information, the Senate must support the FTC's proposed regulation.

The National Automobile Dealers Association (NADA) opposes this regulation as just another example of bureaucratic redtape. What they fail to realize is that this regulation is designed to help, not hurt the overwhelming number of those dealers who are reputable. These dealers will benefit from the regulation which will ensure that all dealers comply with their already high standards.

A postive review of the FTC regulation will reinforce consumer confidence in the government's commitment to safeguard the marketplace from unfair practices.

On behalf of millions of concerned consumers, I strongly urge you to support the FTC's trade regulation on used vehicles.

Sincerely,

PETER KOSTMAYER, *President.*

NATIONAL CONSUMER LAW CENTER INC.,
Boston, Mass., November 13, 1981.

Senator ROBERT W. KASTEN, Jr.,
Chairman, Consumer Subcommittee, Senate Commerce Committee, Russell Office Building, Washington, D.C.

DEAR SENATOR KASTEN: I am writing on behalf of several low-income clients to urge your support for the FTC's Trade Regulation Rule on the Sale of Used Motor Vehicles. Although writing on behalf of a particular client, NCLC's comments are based on the experience of these clients and of previous low-income clients who had problems with their used cars.

NCLC has participated since 1975 in the promulgation of the Used Car Rule. NCLC has commented on various proposed rules and the Staff and Presiding Officer's Reports and presented oral argument on the rule.

The experience of NCLC's clients is that used car sales involve a substantial amount of deceptive acts and practices. Typically, the car dealer, whether independent or franchised, misrepresents the mechanical condition of the car and the dealer's responsibilities for after-sale repairs. Though these misrepresentations are often contradicted by an as-is clause, the length of the contract, the fine print, and the positioning of the clauses are such that the average client does not understand that the contract takes away what the dealer promises. Moreover, usually the consumer is committed to the purchase of the car before seeing the contract and so is unprepared psychologically to read the contract or to go back on the decision to buy. The provision that the car is sold as is, included in almost all used car sales, is not explained by the dealer or understood by the consumer. In the typical case involving our clients, the car requires repairs a short time after purchase, sometimes from defects known to the dealer at the time of the sale. These repairs are frequently costly. The buyer fails in his attempt to persuade the dealer to assume the cost and is unable to enforce the oral promises through legal means because of the UCC's parole evidence rule. Not infrequently, the buyer's inability to pay the unexpected repair bills and his dissatisfaction with the fraudulent sale lead to default on the car loan and repossession of the car. In the few cases where low-income buyers purchase a car on warranty, they are frequently misled as to the coverage or duration of the warranty.

Dealers know that defects are present in used cars at the time of sale. The record from the Used Car Rule proceedings shows that dealers routinely inspect vehicles for defects at auction or afterwards through a test drive and visual inspection; discover the defect other times; or are informed of defects by the person who sells the car to the dealer. Because of the substantial information disparity between the buyer, who has little or no ability to independently assess the quality or reliability of the product, and the seller relating to the mechanical condition of the car, the typical buyer relies on misrepresentations regarding mechanical condition.

The Used Car Rule's Buyer's Guide, although weak, would help some consumers with these experiences because it: (1) Discloses defects known to the dealer; (2) if a warranty is offered, informs the consumer of the coverage and duration of the warranty; (3) if no warranty is offered, explains the meaning of the as-is clause; (4) warns buyers not to rely on oral promises; (5) lists the major mechanical and safety systems; and (6) notifies the buyer of the availability of pre-purchase inspection opportunity. The rule provides significant benefits to buyers by:

(1) Increasing the consumer's ability to bargain for the terms he desires. This intensifies pressure on dealers to compete on the basis of warranty term and thus allows market forces to work more efficiently.

(2) Increasing consumer certainty as to the warranty coverage offered on a car. This reduces litigation costs and reduces the impact of oral promises.

(3) Decreasing consumer reliance on oral statements and increasing the likelihood that the consumer will insist on written confirmation.

(4) Enabling consumers to assess more accurately the true costs of ownership, i.e., purchase price plus repair costs for defects.

(5) Increasing repairs by dealer of defective systems in order to avoid disclosing known defects. Any increase in repairs will result from the free flow of information rather than from regulation.

(6) Notifying consumers of the possibility of obtaining pre-purchase inspection. Third-party inspections may reduce buyer reliance on dealer-controlled information and reduce dealer incentive to misrepresent orally mechanical condition. Although third-party inspections may increase costs for increased insurance premiums and employee time to accompany cars off the premises to safeguard against misuse or theft and the cost of foregone opportunities to show cars to other prospective buyers while the cars are off the lot, dealers can pass these costs along to buyers. Since the Rule does not require third-party inspection and still allows the dealers to refuse such inspections, any costs of the sort would be imposed by the market, not by the Rule.

The dealers make four arguments against the rule. First, dealers argue that they will not know when to disclose a defect. This argument is without merit for two reasons. One, dealers have a great deal of knowledge regarding the mechanical condition of their vehicles. They acquire this knowledge from inspections (through trade-ins, auctions and private purchases), from what is known as appearance reconditioning and from repairs in preparing cars for resale, through third parties such as inspectors working for service contract companies and through those who sold the cars to the dealers. Their employees drive and visually inspect the cars. At the hearings dealers testified that they were very confident of their ability to quickly and correctly determine the condition of the car. Second, the list of 14 major systems, placed on the back of the sticker is clearcut. The dealer is not required to draw fine lines. Dealers in Wisconsin who have used the list for several years under Wisconsin's mandatory inspection statute testified during the hearings on the rule that they had no difficulty in making the necessary judgments.

Second, the dealers argue that the rule will cause them great expense. A reading of this very short rule will show that there is nothing to support this claim. The direct costs of providing used car information is minimal. The dealer need only obtain the Buyers Guide and complete it with readily available information. The dealers claim that they will be put to great expense because in order to disclose any defects they must inspect the car and such inspection is expensive. In fact, the definition of knowledge contained in the rule and the explanatory text accompanying the rule make it clear that the dealer need only disclose defects that come to his attention in the ordinary course of business.

Third, the dealers claim that the rule requires mandatory inspection. This is not true, as the facts above show. But even if some dealers chose to inspect more thoroughly, the inspection is not expensive. The evidence from Wisconsin which requires inspection, is that it costs $10–15 to inspect. Moreover, inspection does not raise the prices of cars; cars in surrounding states are sold at comparable prices.

Finally, the dealers argue that because the car is in the dealer's possession, he is held to have constructive knowledge of any latent defects. The rule requires no such thing. First, it is a disclosure, not a substantive rule. It does not create law but merely tells a consumer what the existing law is. State deceptive practices already require that dealers (and other sellers) disclose known defects. If existing state law does not hold the dealer responsible for disclosing defects of which he has no knowledge, why would a disclosure rule have that effect?

The dealers' argument that as-is sales are prohibited is groundless. The FTC has taken the position that it does not do so. Were a consumer to claim it does, a court would find it difficult to agree when the drafter of the rule says the rule does not prohibit as-is sales. Dealers probably argue that the requirement that they disclose known defects has the effect of prohibiting as-is sales. But, as stated above, existing state law requirements that known defects be disclosed has been held to prohibit as-is sales.

Sincerely,

MARGARET S. RIGG, *Attorney.*

WISCONSIN AUTOMOBILE & TRUCK DEALERS ASSOCIATION,
Madison, Wis., November 16, 1981.

Hon. ROBERT W. KASTEN, Jr.,
U.S. Senate, Cannon Senate Office Building,
Washington, D.C.

DEAR SENATOR KASTEN: The Wisconsin Automobile and Truck Dealers Association once again wishes to reiterate its support of S. Con. Res. 33 introduced by Senator Pressler disapproving the Used Car Rule published by the Federal Trade Commis-

sion on August 14, 1981. We understand your subcommittee has already held a hearing on the resolution and, through this letter, would like to place our support of the resolution in the subcommittee record.

The Wisconsin Automobile and Truck Dealers Association opposes the FTC Used Car Rule for the following reasons:

1. State law: Used car sales are already governed by strict state laws and regulations in Wisconsin. Wisconsin dealers are required to place a window sticker in each used car prior to sale (Attachment I) and complete a motor vehicle safety inspection form (Attachment II) for each used car prior to sale. The FTC Used Car Rule also provides for a used car sticker with similar information, but with a different format and required content. The federal regulation unnecessarily complicates and creates confusion with state regulation which has worked in Wisconsin. Wisconsin and other states have dealt with used car sale problems and existing state regulations should not be interfered with by the FTC.

2. Legal authority: The Federal Trade Commission asserts that its authority to promulgate the Used Car Rule is derived from the Magnuson-Moss Warranty Act and the Federal Trade Commission Act. Neither federal law, however, permits the FTC to create substantive obligations for dealers in used car sales. Magnuson-Moss attempts to clarify warranty terms and disclosures and the FTC Act is intended to regulate fraudulent practices. The intent of the FTC Used Car Rule is to force dealers to warrant used cars and components. Neither Magnuson-Moss nor the FTC Act provide the FTC with this type of authority to create further sale obligations for dealers.

3. Vagueness: Specific portions of the used car window sticker proposed by the FTC are vague and will create uncertainty for used car dealers and customers. For example, the rule requires dealers to disclose "major known defects" on the window sticker. There is no clear guidance in the rule establishing what obligations or liabilities dealers may incur as a result of this disclosure requirement. The disclosure creates uncertainty in transactions. If a customer discovers a defect or a defect occurs subsequent to sale, the customer and dealer are faced by a dispute over whether the defect was "major" and "known" by the dealer prior to sale. This, in essence, eliminates a dealer's ability to sell "as-is."

4. Applies to dealers only: A further objection to the FTC's Used Car Rule is that it applies to dealer sales only. Recent statistics show that Wisconsin dealers sell only about 40 percent of all the used cars sold in Wisconsin. To be effective, any rule regulating used car sales must apply to all sales, not just a minority. Moreover, the rule places dealers in a continuing competitive disadvantage to non-dealer sellers. The result will be a further eroding of the dealer market. This market erosion has been statistically verified in Wisconsin since adoption of used vehicle regulations applying only to dealers in 1973. The FTC Used Car Rule will only make matters worse.

5. Economy: The automobile industry is currently facing unprecedented financial losses and many dealers are relying heavily on used car sales to stay in business. The FTC's action demonstrates a total insensitivity to today's economy and the plight of retail automobile dealers. The Used Car Rule will increase dealer and consumer costs and is a roadblock to economic recovery in the industry.

The Wisconsin Automobile and Truck Dealers Association appreciates your continued interest in the FTC Used Car Rule. We urge you and your subcommittee to support S. Con. Res. 33 to do away with this unnecessary and burdensome regulation.

Best regards,

GARY D. WILLIAMS, *President.*

Enclosures.

ATTACHMENT I

USED VEHICLE WINDOW STICKER

Model Year 19____ Make _____

Identification Number _____

Engine Type _____ Transmission _____

Stock # _____ Asking Price $_____

VEHICLE USE: This vehicle previously was used as a

- ☐ Privately driven vehicle
- ☐ Leased vehicle
- ☐ Rental vehicle
- ☐ Municipal owned
- ☐ Police vehicle
- ☐ Public vehicle
- ☐ Taxi-driven
- ☐ Company vehicle
- ☐ Demonstrator
- ☐ Executive driven
- ☐ Driver education vehicle
- ☐ Flood damaged vehicle

ODOMETER: The Odometer Reading at time of trade-in or purchase was _____ miles which is corroborated by the prior owners statement and is (CHECK ONE)
(ODOMETER READING)

☐ the actual mileage ☐ not known to be the actual mileage

☐ Known to be inaccurate and known actual mileage was _____ miles.

Name, address and mileage (odometer) statement of prior owner available upon request.

This vehicle is for sale:

☐ With limited warranty as follows: _____

_____

Ask salesperson to see copy of warranty.

☐ AS IS. No warranty, express or implied.

EXCEPT FOR ANY MANUFACTURER'S OR OTHER EXPRESS WARRANTY WHICH EXISTS ON THIS VEHICLE, THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE VEHICLE IS WITH THE BUYER, AND SHOULD THE VEHICLE PROVE DEFECTIVE FOLLOWING THE PURCHASE, THE BUYER WILL ASSUME THE ENTIRE COST OF ALL SERVICING AND REPAIR.

☐ Service agreement available, ask salesperson for details.

☐ Mechanical Breakdown Insurance available — ask sales person for details.

WATDAS: #4 10/78

94223

ATTACHMENT II

WATDASH 05 8/70

DISCLOSURE STATEMENT FOR USED MOTOR VEHICLES

Original — Dealer Retain
Duplicate — Customer Copy

DEALERSHIP	VEHICLE STOCK NO.	YEAR — MAKE
	IDENTIFICATION NUMBER	
	AUTHORIZED DEALER INSPECTION AGENT	DATE

"I have exercised reasonable diligence in inspecting this vehicle, including at least a review of my repair records, the prior owner's disclosure, a walk-around and interior inspection, an under-hood inspection, an under-vehicle inspection, and a test drive. On the basis of such inspection, I declare the apparent existing condition to be as indicated in the boxes below."

Disclosure of general condition as required by MVD 24.03(5)

YES	NO	
		FRAME & BODY
☐	☐	Apparent cracks or corrective welds on frame
☐	☐	Dogtracks - bent or twisted frame
☐	☐	Inoperative doors
		ENGINE
☐	☐	Known or visible oil leakage, excluding normal seepage
☐	☐	Cracked block or head
☐	☐	Bolts missing or inoperable
☐	☐	Knocks or misses
☐	☐	Abnormal visible exhaust discharge
		TRANSMISSION & DRIVE SHAFT
☐	☐	Improper fluid level or visible leakage, excluding normal seepage
☐	☐	Cracked or damaged case, which is visible
☐	☐	Abnormal noise or vibration
☐	☐	Improper shifting into or functioning in all gears
☐	☐	Manual clutch slips or chatters
		DIFFERENTIAL
☐	☐	Improper fluid level or visible leakage, excluding normal seepage
☐	☐	Cracked or damaged housing, which is visible
☐	☐	Abnormal noise or vibration
		COOLING SYSTEM
☐	☐	Improper fluid level or visible leakage
☐	☐	Leaky radiator
☐	☐	Improperly functioning water pump
☐	☐	Inadequate antifreeze strength for season of year
		ELECTRICAL SYSTEM
☐	☐	Improper fluid level or visible leakage of battery
☐	☐	Battery fails to start engine
☐	☐	Improperly functioning alternator, generator, or starter
		FUEL SYSTEM
☐	☐	Visible leakage
		ACCESSORIES - INOPERATIVE
☐	☐	Gauges and warning devices
☐	☐	Radio
☐	☐	Heater & Defroster
☐	☐	Air Conditioner
☐	☐	Dash Lights
☐	☐	Windows

Explain probable cause for malfunction or defect on all items marked "Yes".

Disclosure of safety equipment defects as required by MVD 24.03(6)(a) 2.

ALL REQUIRED safety equipment items below, except those marked "Not OK", are in legal operating condition. If the dealer does not correct all such defects prior to delivery of the vehicle to the retail purchaser, the required warning statement must be made on the contract, the vehicle must be towed or hauled, the title application shall be marked "THIS VEHICLE MAY NOT BE LEGALLY OPERATED ON WISCONSIN HIGHWAYS AND NO REGISTRATION WILL BE ISSUED" and sent by the dealer to the Division of Motor Vehicles on behalf of the purchaser.

NOT OK	OK	
☐	☐	Headlamp and Aim
☐	☐	Parking Lamps
☐	☐	Directional Lamps
☐	☐	Flashing Warning Lamps
☐	☐	Sidemarker Lamps and Reflectors
☐	☐	Tail Lamps
☐	☐	Back Up Lamps
☐	☐	Brake Lamps
☐	☐	License Plate Lamp
☐	☐	Steering and Suspension
☐	☐	Front Bumper and Fenders
☐	☐	Hood and Trunk Latches
☐	☐	Emission System
☐	☐	Door Latches
☐	☐	Tires
☐	☐	Exhaust and Fuel System
☐	☐	Rear Bumper and Fenders
☐	☐	Rear Suspension
☐	☐	Windshield
☐	☐	Other Windows
☐	☐	Windshield Wipers
☐	☐	Horn
☐	☐	Mirror
☐	☐	Speed Indicator
☐	☐	Odometer
☐	☐	Restraining Devices and Seats
☐	☐	Service Brake
☐	☐	Parking Brake
☐	☐	Floor and Trunk Pans

Explain all items marked "Not OK".

NOTE: Unless otherwise agreed to in the written purchase contract, this form shall neither create any warranties, express or implied, nor affect warranty coverage provided for in the purchase contract.

I certify that I have read, understood and have been given a copy of this vehicle disclosure statement.

STATE OF WISCONSIN, DEPARTMENT OF JUSTICE,
Madison, Wis., November 20, 1981.

Hon. ROBERT KASTEN,
U.S. Senator, Chairman, Senate Consumer Subcommittee on Commerce, Science, and Transportation, Russell Senate Office Building, Washington, D.C.

DEAR SENATOR BOB KASTEN: I am writing to express the views of the Wisconsin Department of Justice regarding the Sale of Used Motor Vehicles Trade Regulation Rule, 16 C.F.R. Part 455, which has recently been issued by the Federal Trade Commission. This rule is now being reviewed by the Senate Commerce Committee.

Our Department has actively participated in this Federal Trade Commission rule-making proceeding since 1976. Federal Trade Commission staff contacted members of our staff at an early stage bacause Wisconsin has comprehensively regulated used motor vehicle sales since 1972. Wisconsin's experience with used car regulations was closely studied during the rule-making process and representatives from our Department as well as the Wisconsin Department of Transportation extensively testified and commented on the proposed rule.

For your information, I am enclosing a copy of chapter MVD 24 Wis. Adm. Code, an administrative rule issued by the Wisconsin Department of Transportation.[1] The Department of Transportation regulation requires inspection by motor vehicle dealers of all used motor vehicles prior to sale and disclosure of the results on a prescribed form. *See* section MVD 24.03(5) Wis. Adm. Code. Our Department took the position in the proceedings before the Federal Trade Commission that mandatory inspection of used motor vehicles would be an effective means of eliminating the abuses in used motor vehicles sales. Although this mandatory inspection alternative was seriously considered by the Commission, the final FTC rule does not require an inspection by the dealer but only requires desclosure of known defects and warranty information on a window sticker.

The final FTC rule would no doubt be of some benefit to purchasers of used motor vehicles in states which do not already comprehensively regulate used motor vehicle sales. However, we do not believe the rule would have a significant consumer protection impact in Wisconsin. In fact, we believe that our state regulation provides substantially more protection for consumers than would the federal rule. We also believe that there would be more effective enforcement under our state regulation because the Wisconsin Department of Transportation has inspectors to monitor compliance with the state rule while the Federal Trade Commission would not be able to devote similar resources to monitoring compliance with its rule. Moreover, we are concerned about the possible preemptive effect of this rule on our state regulation. We also are concerned that industry might use the federal rule as an excuse to eliminate our state regulation. Although there exists an exemption procedure under sec. 455.7 of the federal rule, we have no idea how it would be applied to our state regulation or how long it would take to obtain a determination on an application for exemption.

We are further concerned about duplication of paperwork and forms if Wisconsin is not exempted from the federal rule. Our state regulation currently requires that a window sticker providing certain disclosures be posted on a used motor vehicle offered for sale by a dealer. Under a proposed revision to the state regulation, the results of the mandatory inspection of the vehicle would also have to be disclosed on the window sticker rather than on a separate form. If both state and federal regulations apply in Wisconsin, a state sticker and a federal sticker would have to be posted on a used motor vehicle offered for sale in Wisconsin. We do not feel this is desirable. We believe Wisconsin should be allowed to maintain its state regulation and window sticker and Wisconsin dealers could either be exempted from the Federal rule or be allowed to make disclosures required by the federal rule on the state window sticker so that two stickers are not required. This would minimize paperwork for dealers without sacrificing consumer protection.

Representatives of our Department have discussed this matter with representatives of the Wisconsin Department of Transportation and that Department concurs with our comments. Thank you for providing us the opportunity to comment on the used motor vehicle trade regulation rule issued by the Federal Trade Commission.

Sincerely yours,

BRONSON C. LA FOLLETTE,
Attorney General.

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[1] The material referred to has been retained in committee files.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL,
Washington, D.C., December 8, 1981.

(Memorandum)

To All members of the Committee on Commerce, Science, and Transportation.
Re Used car rule.

DEAR SENATOR: I understand that the Committee on Commerce, Science and Transportation will soon consider Senate Concurrent Resolution 33, which would disapprove the Used Car Rule promulgated by the Federal Trade Commission, and I am writing to bring to your attention the enclosed resolution that this Association approved on December 4 in support of the FTC Used Car Rule and in opposition to any legislation that would veto that Rule.

Each year the offices of the state Attorneys General receive hundreds of complaints from citizens about the mechanical condition of used cars sold by dealers, and about the existence and extent of any warranties offered by dealers in used cars. The FTC Rule will be of considerable help to citizens shopping for used cars, and I urge you to vote against S. Con. Res. 33 during Committee mark-up.

Thank you very much for your consideration of our views.

Sincerely,

C. RAYMOND MARVIN.

Enclosure.

NATIONAL ASSOCIATION OF ATTORNEYS GENERAL MID-WINTER MEETING, DECEMBER 1–4, 1981, NEW ORLEANS, LOUISIANA

RESOLUTION—FTC USED CAR RULE

Whereas, the Congress of the United States is considering legislation to veto the Used Car Rule promulgated by the Federal Trade Commission; and

Whereas, each year the offices of the state Attorneys General receive hundreds of complaints from citizens about the mechanical condition of used cars sold by dealers, and about the existence and extent of any warranties offered by dealers in used cars; and

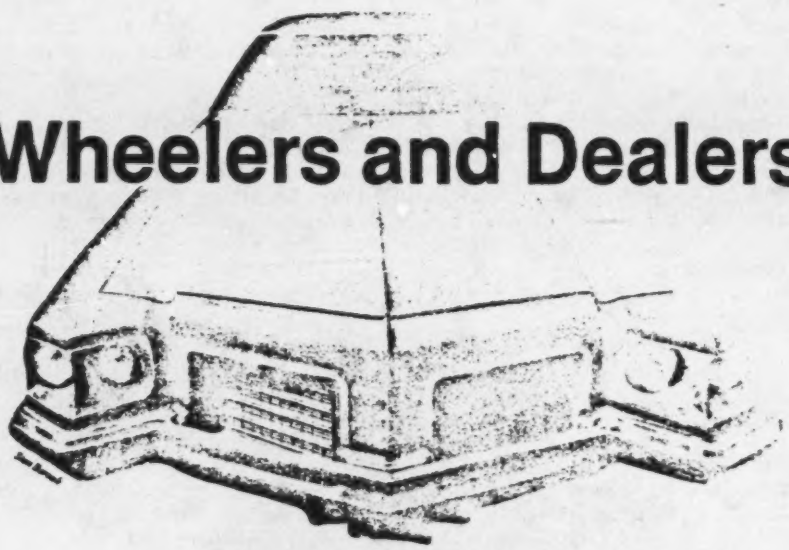
Whereas, the FTC Used Car Rule creates an effective tool to help citizens avoid being deceived; and

Whereas, the Used Car Rule does not preempt the efforts of individual states to cope with these problems; now therefore, be it

Resolved, That the National Association of Attorneys General: (1) Supports the FTC Used Car Rule and opposes legislation that would veto that Rule; and (2) authorizes the General Counsel to transmit the views of this Association to the Congress of the United States, the Administration, and other appropriate officials.

Attorney General Mark Meierhenry of South Dakota dissents.

Wheelers and Dealers



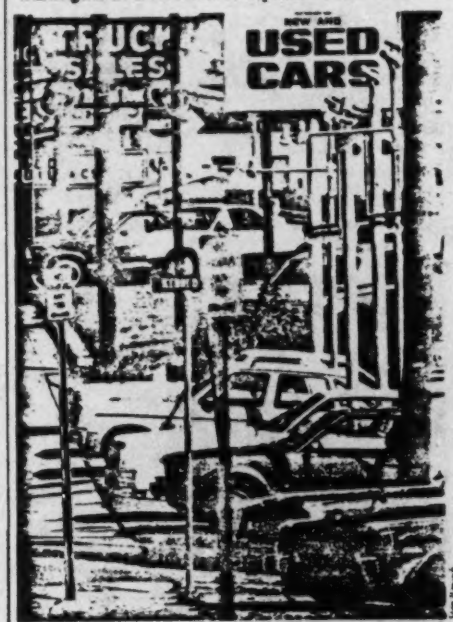
At stake for the car dealers is a provision that would require them to post a window sticker on every used car they sell disclosing any defects they know of in the car and any warranties that come with the car. The dealers converged on Washington in September to fight this "obnoxious" rule.

By Patricia Theiler

The microphone projected well enough for everyone to hear. But in his excitement, the speaker's voice was reaching a high pitch. "We have heard from the president! And I want to read the letter to you..."

The mostly middle-aged men greeted the announcement with the appearance of sophisticated disinterest, as if they were used to receiving frequent presidential attention. The rows and rows of well-dressed shoulders reacted nonchalantly to President Reagan's hopes for a "productive conference."

The occasion was the National Automobile Dealers Association's (NADA) "Directions 81" conference held in Washington in the middle of September. And President



Reagan wasn't the only one to respectfully acknowledge the presence of the 300 or so car dealers in town from around the country. This was the dealers' week to court and to be courted in Washington.

A tally of the political points made by those attending shows what a fruitful week it was: by the end of the conference, a top presidential advisor and Members of Congress had promoted the president's economic recovery plan; and, more importantly, 20 senators and 90 representatives had pledged to help squelch a Federal Trade Commission's (FTC) regulation on the sale of used cars, actually a fairly weak rule compared with others the FTC had suggested, but nevertheless strongly opposed by NADA.

At stake for the car dealers is a provision that would require them to post a window sticker on every used car they sell disclosing any defects they know of in the car and any warranties that come with the car.

Patricia Theiler, a Common Cause *magazine writer, attended the National Automobile Dealers Association conference registered and identified as a writer with Common Cause.*

FTC—Unpopular With Business

About four out of five U.S. motorists buy used cars as their primary form of transportation, according to an industry study. Consumer protection agencies say used car sales are a major complaint among consumers.

If the regulation proposed by the FTC, the independent agency created by Congress in 1914 to police the marketplace and to guard against unfair business practices, goes into effect it would have the same impact as a law passed by Congress.

Congress has 90 legislative days from the day the rule was issued in August to make a decision. That means they could veto the decision any time within the next few months. And there's a very good chance that the proposed sticker may end up in the legislative junk heap rather than on the windows of used cars being sold across the country.

Until the last two years or so, the FTC was one of the most aggressive agencies in Washington, acting in many cases very much like a consumer protection agency. Thanks to the FTC, for example, T.V. advertisers must now substantiate the claims they make in their commercials. And it was the FTC that established standards for home insulation so that when consumers go to the marketplace, companies have to tell them how well their product insulates from the cold. Consumers can thank the FTC for requiring their eye doctors to give them copies of their eyeglass prescriptions so that they can have their glasses made wherever they want, and for countless other consumer protection regulations.

But the aggressive consumer stance taken by the FTC over the years has made it an unpopular agency among the groups whose actions it polices.

Because it has authority over so many businesses and industries and has been so aggressive in asserting that authority, it has been the target of countless attacks. Many special interest groups would like to see the FTC killed entirely, so that they don't have an independent agency holding them accountable to the consumer for their business practices.

Last year, the special interest groups turned to Congress with pleas to bring the FTC under control. Congress acted. It gave itself the power to veto any FTC regulation if both Houses of Congress act within 90 days after an FTC rule is proposed.

The used car regulation will be the first FTC rule subject to the veto by Congress. Both critics and supporters of the FTC are awaiting the outcome.

Because Congress now has this veto power, critics say the FTC has already begun to cave in. Anticipating close scrutiny of its proposed rules from a much more conservative Congress, the FTC, their critics say, is already censoring itself by proposing weaker rules. The weakened used car rule, they say, is a good example.

The used car rule—weak though it may be from the viewpoint of consumer groups—is a bellwether. There are at least 20 proposed regulations waiting in the wings—rulings to correct abuses in such areas as hearing aids, mobile homes, the funeral industry, eyeglasses and vocational schools.

A veto of the used car rule by Congress will send clear signals to both the FTC and to special interest groups.

Auto Dealers' PAC In High Gear

Not surprisingly, it doesn't look good for the used car regulation. As it turned out, the automobile dealers couldn't have held their "Directions 81" conference at a more propitious time. Congress had just reconvened from the August recess, and the timeliness of their conference gave the auto dealers the perfect opportunity to lobby a Congress they had helped elect through their generous

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About four out of five U.S. motorists buy used cars as their primary form of transportation, an industry study shows. Consumer protection agencies say used car sales are a major complaint among consumers.

political action committee (PAC) contributions in the last campaign.

One of the largest and oldest trade associations in the country, the National Automobile Dealers Association, founded in 1917, has 20,000 new car and truck dealers (many of whom also sell used cars) as members. Its national headquarters are located in NADA's own 10-story building in the Washington, D.C. suburb of McLean, Virginia, along with a suite of offices on Capitol Hill.

Its members are generally prominent, well-established members of communities across the country. Like the auto industry as a whole, auto dealers have been suffering from a slump in car sales caused by inflation, high interest rates and unemployment. As a result, many dealers have either been forced out of business or have come to depend mainly on the sale of their used cars—the only affordable means of transportation for many Americans today.

But despite the hard times for the industry as a whole, the mood of "Directions 81" was jubilant and confident. Unlike Wall Street's skeptical reaction to the president's economic program, the dealers showed an unchecked appreciation for the president's programs and greeted his spokesmen with standing ovations and fanfare.

Any nervousness the dealers may have had about the ability of the administration to bring down high interest rates, an undercurrent that surfaced periodically at the conference, was overshadowed by elation over another part of the president's program: the commitment to regulatory reform which has resulted in hundreds of regulations being targeted for abolishment.

For an industry selling one of the most regulated products in America, the campaign for "regulatory reform" could mean the savings of billions of dollars in the cost of regulations requiring everything from air bags to health standards in the workplace.

The dealers' euphoria over being in a changed Washington was clearly evident when Rep. Phil Gramm (D-Texas) talked to the group about President Reagan's economic program.

"There is a simple way to tell who is for real in Washington," Gramm told the dealers. "Did he vote for the Gramm-Latta budget bill, and did he vote for the reconciliation bill?"

Gramm, co-sponsor of the bill that was the congressional counterpart of the president's plan for economic recovery passed early this summer, was there to tell the dealers what was in store for the country under the president's plan. His sales pitch frequently emphasized the anti-government sentiment popular with the group.

"Our goal (with the budget bill) was not to reallocate wealth, but to create the incentive for wealth," said Gramm. He could see the audience was with him as he quipped to a burst of applause, "We changed the name (on tax forms) from 'unearned income' to 'investment income' because only the federal government has unearned income."

In response to an audience question on the Clean Air Act, which expires this year, Gramm said, "We need a thorough rewrite of the Clean Air Act in order to examine cost and benefit. . . All we've heard is the whining of environmentalists who don't want to change anything."

If Gramm was there mainly to sell the president's economic program, he also took advantage of the political opportunity to give credit where credit was due. The packed audience in the conference hall at the Hyatt Regency listened while Gramm acknowledged the helpful hand NADA had given him.

"Your political action committee was a substantial contributor to my campaign," Gramm said. "I can say that without your political action contribution, I would have lost. And without your contribution, I would not have been able to come up with the Gramm-Latta budget!"

Rep. Phil Gramm (D-Texas)

"Your political action committee was a substantial contributor to my campaign. I can say that without your contrition, I would have lost."

And, with the not so subtle reminder that one election is followed by another, Gramm ended by "urging you and your political action committee to get involved in the 1982 elections. And for God's sake, don't support those who don't support your views," especially the "moderates," he warned, who are "worse than the liberals."

Gramm has every reason to be grateful to the NADA PAC. It gave him $6,200 during the last election. The auto dealers' PAC ranks number four among the more than 2,000 PACs in the country in contributions to 1980 elections, behind only the American Medical Association, the National Association of Realtors and the United Auto Workers. In 1980, NADA, which didn't even have a PAC until 1975, gave $1,034,875 to congressional candidates.

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"Today, we're going to talk about the FTC's 'Immaculate Conception' called the used car rule. We think we have a way to help dealers fight this obnoxious piece of legislation."

As NADA officials were quick to point out, those PAC contributions might be the deciding factor when Members of Congress vote on the used car rule.

After listening to Gramm, the dealers took a coffee break, and the staff put information about the used car rule on every chair in the room. Dealers milled about the room, shaking hands and slapping backs. A filmed cartoon documenting the perceptions of a visitor from the planet Mars, who assumed cars were the highest form of Earth life, provided a surreal backdrop.

As the cartoon story line ended, showing frame after frame of moving factory parts maniacally squashing, molding and buffing a pink sports car in what the Martian deducts is the earthly reproductive cycle, the dealers took their seats to hear more about the used car regulation.

NADA Government Relations Chairman Al Crawford addressed the audience. "What Phil Gramm says is true. PAC contributions open the door for dealers to go up to talk to their congressmen."

"Today, we're going to talk about the FTC's 'Immaculate Conception' called the used car rule," he said sarcastically. "We think we have a way to help dealers fight this obnoxious piece of legislation."

The way to fight the rule turned out to be a no-holds-barred lobbying effort on Capitol Hill by the dealers attending the conference. Like a football coach trying to build up the team's confidence, staff and NADA leaders emphasized the strength of the NADA PAC as they cheered the dealers onto the congressional frontline to win this one for the home team.

Used Car Sales, Major Consumer Complaint

It is something of a miracle that the FTC's used car regulation ever saw the light of day. The FTC first looked into the problem back in 1973 when a consumer protection specialist with the FTC's regional office in Seattle discovered that used car sales were a major consumer problem. Recommendations sent to Washington by the Seattle FTC office persuaded the FTC to begin a national investigation of the industry.

In 1975, Congress instructed the FTC to begin a process of public participation—to give all parties interested in or possibly affected by a proposed rule a full opportunity to comment. What followed was a two-year period of hearings and public comments by consumers, used car dealers, dealer associations, consumer groups, state and local law enforcement officials, Members of Congress, legal aid attorneys, auto rental and leasing associations, federal agencies and other interested parties. Public hearings were also held in six cities.

Used cars are sold by franchised dealers (such as the NADA members, who sell both new and used cars), independent dealers (who own a used car lot only) and by individuals selling through word of mouth or classified ads. In 1980, a record 18.7 million used cars were sold.

Despite the fact that buying a car, even a used one, is a major investment (the average used car sold for $3,794 in 1980, an industry study shows), most consumers buy the product with very little knowledge about its mechanical condition.

Most dealers aren't fooled by the consumer who tries to act knowledgeable about a car by staring into the engine or kicking the tires. The consumer's lack of expertise puts him or her in a vulnerable position when the used car dealer is trying to sell the car.

Here are some of the abuses discovered during the FTC's investigation of the industry:

- Used car dealers frequently orally misrepresent the mechanical condition of the cars they sell. Dealers frequently fail to disclose known defects and often say the car is sound when it isn't or make unsubstantiated claims about the car's condition.

For example, a study for the FTC on the industry by the California Public Interest Research Group in 1978 found that in 75 of 101 test cases in which a customer took a car off a dealer's lot for a diagnostic test and returned it to the dealer with a list of defects, the salesmen failed to tell a second prospective buyer the defects disclosed.

- A common abuse cited during the proceedings is the practice of sellers making oral promises to the buyer about a car and then contradicting those claims in the written contract. Because the written contract absolves the dealer from responsibility to repair, he is not obligated to honor oral statements made during the bargaining situation.
- A "nearly universal practice" said the FTC is the reconditioning of the car's appearance, known as "detailing." Detailing involves the thorough cleaning of the car's interior, exterior, trunk, and engine compartment so the car looks newer. An extensive detailing job can include anything from adding a "new car smell" to the interior to the spraying of a coat of lacquer to the cleaned engine to make weathered rubber products look new.

As a result, the consumer is led to believe the car is in better condition and newer than it really is.

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The record of abuse in the used car market was so compelling to the FTC staff in 1978 that it recommended the FTC require all used car dealers to inspect the cars they sell and to make the information available to the potential customer and to disclose warranty information about the car so the customer wouldn't think the car was under a guarantee when it was not.

The commission rejected the staff proposal for a mandatory inspection of used cars and instead proposed a rule giving the dealer an option to inspect. Under the optional inspection rule, the dealer was not required to inspect the car but was required to indicate on a window sticker whether parts of the car were "O.K.," "Not O.K.," or "No rating," which would have meant the car had not been inspected.

But thanks to congressional pressure, the commission rejected the rule for optional inspection in favor of the rule proposed this summer which requires dealers to list any defects they know of on a buyers' guide posted in the window and to disclose any warranties. "Any defects they *know of*" are the key words in the rule.

The rule is considerably weaker than the mandatory or optional inspection rules. Most consumer groups call it "watered down." Earlier rules required the dealer to do more than post a sticker on the window. They required a rating on various parts of the car, which the FTC hoped would have encouraged consumers to shop around for a car based on the rating.

But despite the fact that the FTC pulled in its horns considerably and issued a weaker rule, NADA still doesn't like the rule. They have filed a lawsuit claiming it is "nebulous, ambiguous and unworkable thereby leaving dealers in a position where compliance is impossible." NADA doesn't object to the part of the rule requiring dealers to disclose warranty information.

They also claim that the rule "artificially creates a competitive disadvantage" to the car dealer, says NADA Legislative Director Tom Green, because it will apply only to used car dealers and not to private individuals selling used cars. But the FTC found that it was the dealer market that needed the regulating, not the private market. There "was a lack of evidence of a substantial problem in the private market," the FTC staff report said in 1978.

NADA doesn't deny that there are abuses in the market. "We're not really arguing that there's not a problem," Executive Vice President Frank McCarthy told *Common Cause*. "But we're not really aware of how to deal with the problem, except to tell consumers to buy from reputable people."

The proposed rule is "just a patchwork thing that was poorly written," says McCarthy.

"Directions 81" Heads for The Hill

Just in case the NADA lawsuit against the rule doesn't do the trick, NADA has planned a legislative tack.

The focal point for their fight is a veto resolution introduced by Rep. Gary Lee (R-N.Y.) which could kill the rule if Congress passes it within the next few months. Sen. Larry Pressler (R-S.D.) introduced a similar resolution in the Senate.

The dealers were ready to do their part.

"This is the perfect starting point because all of you are in town," Tom Green told the 300 car dealers in the audience the second day of the conference. "We only have 90 days on this issue. We've got to go after this issue now!"

"Today, the top priority is the used car rule and the legislative veto because the clock is running," echoed Frank McCarthy. "We have got to pass this resolution!" McCarthy emphasized, noting that all those attending should have made plans to meet with their congressmen.

Rep. Gary Lee (R-N.Y.)

The focal point for the dealers' fight against the used car regulation is a veto resolution introduced by Rep. Gary Lee (R-N.Y.) which could kill the rule if Congress passes it within the next few months.

If the dealer's congressman had received NADA PAC contributions, "I can almost assure you he will at least give you a chance to talk," McCarthy continued.

"We have promised Lee that we would have 100 co-sponsors by tomorrow noon," McCarthy said. "We can do it if you do your job."

A minute after McCarthy finished his rallying speech, a note, apparently unsolicited from the audience, was passed up to the podium. Announcing that he "was reading a note from a conference participant," McCarthy read excitedly. "This is a super conference. . . You've got us all wound up! We have to win this legislative vote! Challenge us to go to the Hill and report tomorrow by roll call to find out who will be co-sponsors of the bill!"

"If people get up to leave, it's because they have appointments on the Hill," the voice at the podium said apologetically but firmly as the waiters finished serving the last plates of dessert.

The note of apology was to the luncheon speakers, one of whom was Sen. Jake Garn (R-Utah), chairman of the Banking Committee, who talked about taxes ("You might find that with a tax cut, consumers can put a down payment on one of your cars. . . I've talked to economists for the last six years, and they've all been consistent. Consistently wrong. . . You might not be aware of how economists get to Washington. They go to Harvard and [illegible] left.").

With the members still trickling out of the room, Frank McCarthy ended the luncheon session by reminding the remaining car dealers that copies of the legislative veto were at the doors. "Today has been extremely productive," said McCarthy. "But the jury is out until we talk to you about your efforts tomorrow."

The man in the taxi cab leaned back with the unconscious ease of someone used to the comfort of luxury cars. "The Watergate, please." Like the majority of conference participants, he personified the practiced gregariousness of the successful salesman who has made a good living out of learning how to get along with people: the boyish charm that colors every discussion with some degree of pleasantness.

"I'm off to see my new congressman this afternoon," he says, and then pauses to look out the window to admire the view of the Capitol. Of course, "I've met him before—he stopped by my showroom and introduced himself around to everyone."

During the trip to the hotel and apartment complex whose name in recent months has become synonymous with

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Republican entertaining rather than Republican scandals, the visiting auto dealer talked about high interest rates, the slow sales, the dependence on used (rather than new) car sales—all woes heard during the convention. Problems which caused, he says, "one of the biggest Chevy dealers in the country," to "go out of business this year. . ."

"Every community has a used car dealer. And congressmen hear from the dealers all the time. The used car industry has a lot of political clout," says David Swankin, consumer attorney.

The pressure put on Congress by the auto industry in the past is one reason why many consumer groups and FTC staff claim the FTC rejected its earlier optional inspection rule for used car sales.

The pressure to water down the stricter rule came in the form of another conference held last year by the dealers, the 1980 version of "Directions 81." And according to many sources on Capitol Hill and at the FTC, the only item on the agenda was the used car regulation.

The NADA conference took place at the same time Sen. James McClure (R-Idaho) tried to jerk the used car industry from the FTC's purview. Although McClure's proposal didn't pass, in a compromise move 51 senators agreed to send a letter to then FTC Chairman Michael Pertschuk expressing their concerns "about the practical effects of the (used car) rule."

"You might find that with a tax cut, consumers can put a down payment on one of your cars."

Sen. Jake Garn (R-Utah)

Signed by Democrats and Republicans alike, from liberal Howard Metzenbaum (D-Ohio) to conservative Strom Thurmond (R-S.C.), the letter was "intentionally vague" recalled a Capitol Hill staffer. In an election year when senators perhaps didn't want to offend either industry or consumers, the letter provided an ideal forum for sending mixed messages to both sides.

Consumers could take the letter as a sign of support for the FTC, despite the reservations stated in the letter about the particular rule on used cars. And the letter also sent the industry a message that the used car regulation could likely be vetoed by Congress.

No matter what motivated the 51 senators to sign the letter, the FTC took it as a signal to go easy on the auto dealers.

Consumer attorney Swankin thinks the proposed rule is a "terrible rule" because "there isn't one in 1,000 circumstances that you can prove (the dealer knew) of defects. . . with this rule, you have a window sticker that won't tell you anything."

If the proposed rule is as watered down as some consumer groups say, why is the National Automobile Dealers Association bothering to try to kill it? The answer may be that NADA sees the used car regulation as a test drive for the organization to show its strength when lobbying Congress and the administration on other important regulations.

"We can't lose (the veto of the used car regulation)," Frank McCarthy pleaded with the group at the conference. "If we lose this one, we lose our effect on usury, clean air, and a number of other issues we're working on."

McCarthy was referring to the Clean Air Act, which is now being considered by Congress for reauthorization. The act, first passed in 1970 and substantially amended in 1977, requires the Environmental Protection Agency (EPA) to establish air quality standards, which cars must meet, for safe levels of pollution. NADA and other industry groups poured hundreds of thousands of PAC dollars into the campaigns of House and Senate committee Members reviewing reauthorization of the Clean Air Act.

NADA gave more PAC money to committee Members reviewing the act than any other single PAC, contributing a total of $113,500 to 25 committee Members, a Common Cause study found.

In addition, NADA opposes a slew of other regulations proposed by the FTC, EPA and other government agencies such as the Federal Reserve Board, the Department of Transportation, the National Highway Safety and Traffic Administration (NHSTA), and the Small Business Administration.

Rolling Back the Regulatory Machine

"When I stood up before this crowd last year, I described myself as a harbinger of doom," said Regulatory Affairs Director Bob Wade to the conference participants. "I said our industry was flooded with regulations. I'm pleased to tell you today that the situation has changed."

Wade went on to describe how "as early as November," NADA had submitted a list of recommendations to the president's regulation team urging a comprehensive review of regulations and addressing specific regulations they opposed. In May, they submitted a priority list of regulations that they thought needed review.

"On the highest level, we've been involved in pushing for regulatory reform. I'm pleased to tell you there's been some response. We haven't stopped the machine. We haven't rolled it back. But we have slowed it down," Wade excitedly told the group.

Here are a few of the ways the dealers have slowed down the "machine." Materials handed out at the conference pointed out these NADA victories:

- Approximately 181 regulations affecting both NADA and business in general have been withdrawn, modified or reviewed by federal regulatory agencies since January 20.
- The number of rules affecting business and industry published by the *Federal Register* is roughly 50 percent of the number printed in 1980.
- The Environmental Protection Agency (EPA) and the National Highway Safety and Traffic Administration (NHTSA) will take 34 actions to "assist the automobile industry," the literature said.
- EPA actions, announced April 6, address "57 percent of NADA recommendations."
- Recent NHTSA actions have addressed "100 percent of NADA recommendations."
- NHTSA will postpone the implementation of a regulation that would have required sedan sized cars in model year 1982, and smaller cars in the following two years, to be equipped with air bags or automatically closing seat belts.

"We've accomplished a one year delay in this area," said Regulatory Affairs Director Wade. "In all likelihood, air bags will never become a reality."

- On April 21, The Occupation Safety and Health Administration (OSHA), the agency that protects workers from

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These are the Members of Congress who agreed to co-sponsor a resolution offered by Rep. Gary Lee (R-N.Y.) and Sen. Larry Pressler (R-S.D.) to veto the used car regulation after the car dealers held their conference in Washington. Some signed during the three-day conference; others signed soon after. The list was obtained from the *Congressional Record* and from Lee's office.

House Co-sponsors of the Used Car Regulation Veto

Alexander, Bill (D-Ark.)
Anderson, Glenn M. (D-Calif.)
Ashbrook, John M. (R-Ohio)
Atkinson, Eugene V. (D-Pa.)
Badham, Robert E. (R-Calif.)
Bailey, Wendell (R-Mo.)
Barnard, Doug, Jr. (D-Ga.)
Bevel, Robin L. (R-Tenn.)
Bedell, Berkley (D-Iowa)
Benedict, Cleve (R-W.Va.)
Bethune, Ed (R-Ark.)
Bliley, Thomas J., Jr. (R-Va.)
Boner, William Hill (D-Tenn.)
Bousquard, Marilyn Lloyd (D-Tenn.)
Bowen, David R. (D-Miss)
Brown, Hank (R-Colo.)
Campbell, Carroll A., Jr. (D-S.C.)
Chappell, Bill, Jr. (D-Fla.)
Cheney, Dick (R-Wyo.)
Coleman, E. Thomas (R-Mo.)
Collins, James M. (R-Texas)
Craig, Larry E (R-Idaho)
Crane, Daniel B (R-Ill.)
Daniel, Dan (D-Va.)
Daniel, Robert W., Jr. (R-Va.)
Daschle, Thomas A. (D-S.D.)
Daub, Hal (R-Neb.)
Dorgan, Byron L. (D-N.D.)
Dornan, Robert K. (R-Calif.)
Dowdy, Wayne (D-Miss.)
Edwards, Mickey (R-Okla.)
Emerson, Bill (R-Mo.)
English, Glenn (D-Okla.)
Erdahl, Arlen (R-Minn.)
Evans, Billy Lee (D-Ga.)
Evans, Cooper (R-Iowa)
Fazio, Vic (D-Calif.)
Fiedler, Bobb (R-Calif.)
Fields, Jack (R-Texas)
Forsythe, Edwin B. (R-N.J.)
Frost, Martin (D-Texas)
Fuqua, Don (D-Fla.)
Glickman, Dan (D-Kan.)
Gramm, Phil (D-Texas)
Gregg, Judd (R-N.H.)
Graham, Wayne (R-Calif.)
Gundenson, Steve (R-Wis.)
Hagedorn, Tom (R-Minn.)
Hammerschmidt, John Paul (R-Ark.)
Hansen, George (R-Idaho)
Hansen, James V. (R-Utah)
Hartsett, Thomas F. (R-S.C.)
Hefel, Cecil (D-Hawaii)
Hightower, Jack (D-Texas)
Holland, Ken (D-S.C.)
Hopkins, Larry J. (R-Ky.)
Hubbard, Carroll, Jr. (D-Ky.)
Hunter, Duncan (R-Calif.)
Jeffries, Jim (R-Kan.)
Jenkins, Ed (D-Ga.)
Johnston, Eugene (R-N.C.)
Kindness, Thomas N. (R-Ohio)
Kogovek, Ray (D-Colo.)
Kramer, Ken (R-Colo.)
Lagomarsino, Robert J. (R-Calif.)
Lowery, Bill (R-Calif.)
Luken, Thomas A. (D-Ohio)
Lungren, Dan (R-Calif.)
McCurdy, Dave (D-Okla.)
McDonald, Larry (D-Ga.)
McEwen, Bob (R-Ohio)
Marlenee, Ron (R-Mont.)
Marriott, Dan (R-Utah)
Matsui, Robert T. (D-Calif.)
Mollohan, Robert H. (D-W.Va.)
Moore, W. Henson (R-La.)
Moorhead, Carlos J. (R-Calif.)
Morrison, Sid (R-Wash.)
Murtha, John P. (D-Pa.)
Myers, John T. (R-Ind.)
Napier, John L. (R-S.C.)
Oxley, Michael (R-Ohio)
Parris, Stan (R-Va.)
Pashayan, Charles, Jr. (R-Calif.)
Petri, Thomas E. (R-Wis.)
Peyser, Peter A. (D-N.Y.)
Porter, John Edward (R-Ill.)
Rahall, Nick Joe II (D-W.Va.)
Rhodes, John J. (R-Ariz.)
Roberts, Pat (R-Kan.)
Robinson, J. Kenneth (R-Va.)
Roth, Toby (R-Wis.)
Rudd, Eldon (R-Ariz.)
Santini, Jim (D-Nev.)
Satterfield, F. James, Jr. (R-Va.)
Shelby, Richard C. (D-Ala.)
Shumway, Norman D. (R-Calif.)
Skeen, Joe (R-N.M.)
Skelton, Ike (D-Mo.)
Smith, Albert Lee, Jr. (R-Ala.)
Smith, Denny (R-Ore.)
Smith, Virginia (R-Neb.)
Snyder, Gene (R-Ky.)
Solomon, Gerald B.H. (R-N.Y.)
Stangeland, Arlan (R-Minn.)
Staton, David Michael (R-W.Va.)
Stump, Bob (D-Ariz.)
Synar, Mike (D-Okla.)
Tauke, Thomas J. (R-Iowa)
Taylor, Gene (R-Mo.)
Traxler, Bob (D-Mich.)
Udall, Morris K. (D-Ariz.)
Vento, Bruce (D-Minn.)
Volkmer, Harold L. (D-Mo.)
Wampler, William C. (R-Va.)
Watkins, Wes (D-Okla.)
Weber, Vin (R-Minn.)
Whittaker, Bob (R-Kan.)
Williams, L. ' (R-Ohio)
Winn, Larry, Jr. (R-Kan.)
Wolf, Frank R. (R-Va.)
Wylie, Chalmers P. (R-Ohio)
Young, Robert A. (D-Mo.)

Senate Co-sponsors of the Used Car Regulation Veto

Abdnor, James (R-S.D.)
Andrews, Mark (R-N.D.)
Boren, David L. (D-Okla.)
Burdick, Quentin N. (D-N.D.)
DeConcini, Dennis (D-Ariz.)
Domenici, Pete V. (R-N.M.)
Eagleton, Thomas F. (D-Mo.)
East, John P. (R-N.C.)
Exon, J. James (D-Neb.)
Hatch, Orrin G. (R-Utah)
Helms, Jesse (R-N.C.)
Huddleston, Walter D. (D-Ky.)
Humphrey, Gordon J. (R-N.H.)
Inouye, Daniel K. (D-Hawaii)
Jepsen, Roger W. (R-Iowa)
Laxalt, Paul (R-Nev.)
McClure, James A. (R-Idaho)
Melcher, John (D-Mont.)
Nickles, Don (R-Okla.)
Symms, Steven D. (R-Idaho)
Zorinsky, Edward (D-Neb.)

unsafe environments, "announced its intention to re-evaluate the lead standard, in response to requests by NADA and other interested parties," NADA materials stated. The lead standard regulates the amount of lead in the workplace in order to protect workers—mainly in smelting and auto industries—from unsafe levels.

While they've had a number of successes, the FTC still looms large for NADA. "This bugger never seems to go away," says Wade.

But if NADA hasn't liked the regulatory agency in the past, it may be changing its mind about the new look at FTC. The newly confirmed chairman is James Miller III, a well-known proponent of regulatory reform, who, as chief administrator of the Office of Information and Regulatory Affairs at the White House Office of Management and Budget, helped repeal the many regulations cited in the conference handouts.

Many rules now reaching the end of years of proceedings and ready for final proposal—rules on mobile homes, hearing aids and others—may never result in a final rule if a strong anti-regulatory climate prevails at the FTC.

The used car regulation may be the first of these years-long proceedings to receive sentencing. On the final day of the conference, the dealers reported the results of their efforts to insure that the used car rule is eliminated.

As the dealers socialized over their last meal of the conference, organizers of the lobbying effort on the used car regulation scurried around the room, checking back with dealers on the results of their trips to Capitol Hill. "Unfortunately, we're a lot like Congress," said the NADA member who reported on the final tally of support for the veto. "We're still counting heads. We have more than 90 House Members and more than 20 senators" who have agreed to veto the rule, he told the obviously pleased crowd.

As NADA's "Directions 81" came to a close, the final speeches were heard. The dealers presented the NADA Freedom of Mobility Award to radio commentator Paul Harvey (for helping "protect and promote the ability of the American to go where he wants to, when he wants to, and how he wants to") and heard a speech by Martin Anderson, President Reagan's chief advisor for domestic affairs.

The auto dealers response to Anderson as he spoke on the president's economic plan ranged from unqualified enthusiasm ("What I suggest is, turn your salesmen loose," said one participant, "because what you have is a fantastic program—but the people don't know it yet.") to guarded support ("I hope you're aware that everyone in this room has bet his entire accumulated wealth and that of the next generation on the theory that [the president's plan] will work."). •

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